S. HRG. 98-288

TITLE XIII OF S. 829—TO AMEND THE FEDERAL TORT CLAIMS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

TITLE XIII OF S. 829, THE COMPREHENSIVE CRIME CONTROL ACT OF 1983, WHICH INCORPORATES AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT

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TITLE XIII OF S. 829—TO AMEND THE FEDERAL TORT CLAIMS ACT

THURSDAY, MAY 26, 1983

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE
AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:04 a.m., in room 628, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Staff present: John Maxwell, chief counsel and staff director; Terry T. Campo, counsel; Susan Shirk, chief clerk; and Lynda Nersesian, chief counsel and staff director, Subcommittee on Aging.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. We will call the hearing together.

This hearing is on title XIII of S. 829, and that bill is the Comprehensive Crime Control Act of 1983 which incorporates amendments to the Federal Tort Claims Act. This title of the Comprehensive Criminal Control Act has been jointly referred to the Subcommittee on Criminal Law and this Subcommittee on Administrative Practice and Procedure. The title will be automatically discharged from this subcommittee to the full Judiciary Committee on June 1. We are happy to accommodate the full committee in any way possible to facilitate consideration of the Crime Control Act.

This subcommittee is no stranger to these amendments. Our hearing today is a continuation of those held in the last Congress on identical legislation. As chairman of what was then entitled the Subcommittee on Agency Administration in the last Congress, we heard from 20 witnesses on three separate occasions—November 13 and 16, 1981, and March 31, 1982—on a bill that I introduced, S. 1775, which is virtually identical to the title before us. Those witnesses included the Department of Justice, the American Civil Liberties Union, the Department of Defense, the Federal Bureau of Investigation, Office of Personnel Management, Public Citizen, Government Accountability Project, Federal Managers Association, Senior Executives Association, and a number of other equally distinguished witnesses.

This year I introduced a bill, S. 775, cosponsored by the distinguished chairman of the Judiciary Committee, Senator Strom Thurmond, as well as Senators Dole, Denton, Helms, Jepsen, McClure, and Symms which, again, achieves the same results as the

bill before us with an identical approach. Essentially this legislation would substitute the Government as the exclusive defendant in all constitutional actions and common law tort suits in which the Attorney General certified that the employee was acting within the scope of his or her employment.

Federal employees are being increasingly sued for decisions made during the course of a workday, just doing their job. From forest ranger to Director of the National Cancer Institute, from meat inspector to Cabinet officer, our entire Federal work force is potentially liable for decisions that are made in carrying out Federal missions. Since the Supreme Court's 1971 decision in the case of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, Federal employees have been subject to personal liability which translates to money damages, for what the Court termed "constitutional torts." The *Bivens* case arose from a compelling factual setting. Narcotics agents ransacked a citizen's apartment, arrested and manacled him in front of his wife and family, and ushered him to a Federal courthouse where he was interrogated, booked, and subjected to a visual strip search. This interment was effectuated without probable cause or a search warrant.

Most constitutional torts arise in a much more mundane setting. While immediately following the *Bivens* decision these actions arose in the context of law enforcement, now they increasingly have arisen in the realm of regulatory or personnel actions taken by Federal employees. While a Federal employee embroiled in litigation undergoes untold anguish, it is the taxpayer who is the ultimate loser in this process; and a triple loser to boot. Taxpayer moneys are spent defending employees for what often amount to harassment suits. Taxpayer moneys are spent paying employees who are too intimidated by threats of litigation or ensuing litigation to effectively and innovatively carry out their designated functions. Taxpayer moneys are spent in paying private attorneys fees as a result of the Department of Justice's policy of hiring outside private counsel where its own representation of a Federal employee might produce a conflict of interest.

This legislation that we are considering today, is fashioned to make the best use of taxpayer funds while at the same time insuring adequate compensation to a plaintiff whose constitutional rights have been violated. A grant of personal immunity for Federal employees is needed to remedy a system that, perhaps because of an increasingly litigious bent, hinders rather than encourages production from its Federal work force. It is in society's interest, our interest, to see that the day's labor for the honest and conscientious Federal employee is unthreatened by vexatious lawsuits.

[A copy of title XIII follows:]

TITLE XIII—FEDERAL TORT CLAIMS ACT AMENDMENTS

SEC. 1301. Subsection (b) of section 1346 of title 28, United States Code, is amended—

(1) by inserting "(1)" after "jurisdiction of"; and

(2) by striking out the period at the end thereof and inserting in lieu thereof ", or (2) civil actions on claims against the United States, for money damages, sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or

employment, such liability to be determined in accordance with applicable Federal law.".

SEC. 1302. (a) Section 2672 of title 28, United States Code, is amended in the first paragraph—

(1) by inserting "(1)" after "United States" the first place it appears;

(2) by striking out the colon after "occurred" and inserting in lieu thereof ", or (2) for claims for money damages sounding in tort arising under the Constitution of the United States for injury or loss of property, or personal injury or death, caused by an act or omission of any employee of the Government while acting within the scope of his office or employment, such liability to be determined in accordance with applicable Federal law:";

(3) by inserting "or any award, compromise, or settlement based on a claim arising under the Constitution of the United States" after "$25,000"; and

(4) by striking the figure "$25,000" and substituting therefore the figure "$50,000".

(b) The third paragraph is amended by inserting between the word "made", the second time it appears, and the word "by", the words "or approved", and by inserting between the word "to", the fourth time it appears, and the word "section", the words, "this section or".

SEC. 1303. Section 2674 of title 28, United States Code, is amended—

(1) by striking out the comma after "claims" in the first paragraph and inserting in lieu thereof "other than those arising under the Constitution of the United States,";

(2) by inserting "(a)(1)" at the beginning of the first paragraph;

(3) by inserting "(2)" at the beginning of the second paragraph; and

(4) by adding at the end thereof the following new subsection:

"(b)(1) The United States shall be liable, respecting the provisions of this title relating to tort claims arising under the Constitution of the United States, to the extent recognized or provided by applicable Federal law, and shall be entitled to all defenses heretofore available to an employee of the United States and to which the United States would otherwise be entitled. The United States shall not be liable for interest prior to judgment or for punitive damages.

"(2) Damages in any such case shall be the greater of (A) actual damages or (B) liquidated damages of $1,000 or, in the case of a continuing tort, $100 a day for each day of violation up to a maximum of $15,000.".

SEC. 1304. Subsection (a) of section 2675 of title 28, United States Code, is amended by striking out the comma after "employment" and inserting in lieu thereof "or upon a claim against the United States for money damages for a tort arising under the Constitution of the United States caused by an act or omission of any employee of the Government while acting within the scope of his office or employment,".

SEC. 1305. (a) Subsection (b) of section 2679 of title 28, United States Code, is amended to read as follows:

"(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for claims for injury or loss of property or personal injury or death resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment and for claims arising under the Constitution of the United States for an act or omission of any employee of the Government while acting within the scope of his office or employment, is exclusive of any other civil action or proceeding arising out of or relating to the same subject matter against the employee whose act or omission gave rise to the claim, or against the estate of such employee, and shall also be deemed an equally effective substitute for any recovery against the employee in his individual capacity directly under the Constitution.".

(b) Subsection (d) of such section is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action arose, any such civil action or proceeding commenced in a United States district court shall be deemed an action against the United States under the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. After substitution, the United States shall have available all defenses heretofore available to the employee and all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b) of this title.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action arose, any such civil action or proceeding commenced in a State

court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. After substitution, the United States shall have available all defenses heretofore available to the employee and all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter and section 1346(b) of this title. The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) The certification by the Attorney General under subsection (d)(1) or (2) that the defendant employee was acting within the scope of his office or employment shall be binding and conclusive, except that in the event that the Attorney General has not certified scope of office or employment, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. A copy of the petition shall be served upon the United States in accordance with the provisions of rule 4(d)(4), Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding shall be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending. Should the district court determine that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Where a civil action or proceeding under this chapter is precluded because of the availability of a remedy, compensation, or other benefits from the United States as provided by any other law, the action or proceeding shall be dismissed but in that event, the running of any limitation of time for commencing or filing an application or claim in a proceeding for any such other remedy, compensation, or benefits shall be suspended during the pendency of the civil action or administrative proceeding under this chapter.

"(5) Whenever an action brought against a defendant employee in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim to the appropriate Federal agency pursuant to section 2675(a) of this title, the claim shall be deemed to be timely presented under section 2401(b) of this title, if (A) the claim would have been timely if filed on the date the action against the defendant employee was commenced, and (B) the claim is presented to the appropriate Federal agency within sixty days after dismissal of the action.".

(c) Such section is further amended by adding at the end thereof the following new subsection:

"(f) If a civil action or proceeding under section 1346(b) or 2672 of this title arising under the Constitution of the United States results in a judgment against the United States or an award, compromise, or settlement paid by the United States, the Attorney General shall forward the matter to the head of the department or agency which employed the employee at the time of the act or omission for such further administrative investigation or disciplinary action as may be appropriate.".

(d) Such section is further amended by adding at the end thereof the following new subsection:

"(g) The head of an agency or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (b) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission while acting within the scope of such person's office or employment."

SEC. 1306. (a) Section 2680 of title 28, United States Code, is amended—

(1) by striking out the section heading and inserting in lieu thereof the following:

"§ 2680. Exceptions; claims not arising under the Constitution of the United States";

(2) by inserting ", relating to tort claims other than those arising under the Constitution of the United States," in the first paragraph immediately after "title"; and

(3) by amending subsection (h) to read as follows:

"(h) Any claim arising out of libel, slander, misrepresentation, deceit, or interference with contract rights.".

(b) The item relating to section 2680 in the table of sections at the beginning of chapter 171 of title 28, United States Code, is amended to read as follows:

"2680. Exceptions; claims not arising under the Constitution of the United States.".

SEC. 1307. (a) Chapter 171 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 2681. Exceptions; claims arising under the Constitution of the United States

"The provisions of this chapter and of section 1346(b) of this title which relate to tort claims arising under the Constitution of the United States shall not apply to actions arising from the activities of the Tennessee Valley Authority, the Panama Canal Company, a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.".

(b) The table of sections at the beginning of chapter 171 of title 28, United States Code, is amended by adding at the end thereof the following new item:

"2681. Exceptions; claims arising under the Constitution of the United States.".

SEC. 1308. (a)(1) Subsections (a) through (d) of section 4116 of title 38, United States Code, are repealed.

(2) Subsection (e) of such section is amended—

(A) by striking out "(e)";

(B) by striking out "person to whom the immunity provisions of this section apply (as described in subsection (a) of this section)," and inserting in lieu thereof "employee of the Veterans' Administration"; and

(C) by striking out "Department of Medicine and Surgery" and inserting in lieu thereof "Veterans' Administration".

(b)(1) Subsections (a) through (e) of section 224 of the Public Health Service Act (42 U.S.C. 233) are repealed.

(2) Subsection (f) of such section is amended by striking out "(f)".

(c)(1) Subsections (a) through (e) of section 1089 of title 10, United States Code, are repealed.

(2) Subsection (f) of such section is amended by striking out "person described in subsection (a)" and inserting in lieu thereof "employee of the armed forces, the Department of Defense, the United States Soldiers' and Airmen's Home, or the Central Intelligence Agency".

(3) Subsection (g) of such section is amended—

(A) by striking out "and" at the end of clause (2);

(B) by redesignating clause (3) as clause (4); and

(C) by inserting after clause (2) the following new clause:

"(3) the Governor of the United States Soldiers' and Airmen's Home, in the case of an employee of the United States Soldiers' and Airmen's Home; and".

(4) Subsections (f) and (g) of such section are redesignated as subsections (a) and (b), respectively.

(d)(1) Subsections (a) through (e) of section 307 of the National Aeronautics and Space Act of 1958 (42 U.S.C. 2458a) are repealed.

(2) Subsection (f) of such section is amended—

(A) by striking out "(f)"; and

(B) by striking out "person described in subsection (a)" and inserting in lieu thereof "employee of the National Aeronautics and Space Administration".

(e)(1) Subsections (a) through (e) of section 30 of the State Department Basic Authorities Act of 1945 (22 U.S.C. 2702) are repealed.

(2) Subsection (f) of such section is amended by striking out "person to whom the immunity provisions of subsection (a) of this section apply," and inserting in lieu thereof "employee of the Department of State."

(3) Subsections (f) and (g) of such section are redesignated as subsections (a) and (b), respectively.

SEC. 1309. Section 2520 of title 18, United States Code, is amended by adding at the end thereof the following new sentence: "This section shall not apply to any civil cause of action against an officer or employee of the United States while acting within the scope of his office or employment.".

SEC. 1310. Section 1810 of title 50, United States Code, is amended by adding at the end thereof the following new sentence: "This section shall not apply to any civil cause of action against an officer or employee of the United States while acting within the scope of his office or employment.".

SEC. 1311. (a) Except as provided in subsection (b), the amendments made by this Act shall apply to all claims, civil actions and proceedings pending on, or filed on or after, the date of enactment of this Act.

(b)(1) With respect to any civil action or proceeding pending on the date of enactment against a Federal employee in his individual capacity, the plaintiff may, upon timely demand, (A) retain his right to a trial by jury if the demand for trial by jury

is made prior to or on the date of enactment, or (B) elect a trial by jury if the time for election of a trial by jury pursuant to applicable law has not expired as of the date of enactment, except that in any provisions of section 2674(b) of this title, as added by section 3 of this Act, which relate to liquidated damages, shall not apply.

(2) With respect to any civil action or proceeding pending against a Federal employee in his individual capacity on appeal, or pending against a Federal employee in his individual capacity in a State court in which the time for removal pursuant to section 2679(d) of this title has expired, the amendments made by this Act shall not apply, except that the United States shall be substituted for the defendant employee upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the action or proceeding arose.

(3) The provisions of section 2675(a) of this title shall not apply to a civil action or proceeding against a Federal employee in his individual capacity pending on the date of enactment of this Act, if the provisions of section 2675(a) were inapplicable to the action or proceeding when filed.

Senator GRASSLEY. We have an outstanding panel of witnesses with us today. We have Judge Webster from the Federal Bureau of Investigation. He is going to lead it off. I want to thank you for coming back again on this subject, and for the other times that you have appeared before subcommittees of which I have been chairman or a member. I want to thank you very much. I want to note for the record that is the second time that he has devoted a considerable amount of effort to voicing the views of the Bureau on this legislation. And we thank you for taking so much time to do that.

Would you proceed? And as usual procedure, not only in the case of your testimony, but let me have as a reminder for everybody who will be testifying, that your entire record, if you desire, will be printed in the record. And we would encourage you to summarize to the greatest extent possible.

Thank you. Proceed.

STATEMENT OF WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. WEBSTER. Thank you, Mr. Chairman. And I would just like to say that on this subject I will be glad to come back just as often as you invite me. Nothing in a legislative way is more important to the FBI and to its special agents.

I am again pleased to testify on proposed amendments to the Federal Tort Claims Act. FBI executives at Bureau headquarters consider these amendments our No. 1 legislative priority. I concur with that evaluation. In my judgment, it is essential to remove the threat of personal liability from Government employees charged with enforcing the Federal criminal law. Proposals similar to the one being considered today have been before Congress for a number of years. Literally scores of witnesses have furnished views on the merits of these amendments. It seems clear to me that there is basic agreement on the need for this legislation. Allowing suits against the United States for common law and constitutional torts would benefit all concerned.

As you noted last year, Mr. Chairman, passage of this legislation would remove the threat of financial ruin from our Federal civil servants and offer an attainable financial remedy to those whose rights have been violated. The burden on the Government would be reduced by simplifying the cases. Litigation costs would be reduced

by encouraging settlements, something an individual *Bivens* defendant is unlikely to do.

There does continue to be some disagreement over specific provisions in the various proposals to amend the Federal Tort Claims Act. The most troublesome appears to be the issue of whether the Government should be allowed to assert defenses now available to employees sued individually. The most common of these, of course, is the qualified immunity, or good-faith defense. The bill we consider today would retain it. A bill, H.R. 595, voted out of a House subcommittee last week would not. In my view, there are several valid reasons why the Government should be permitted to assert this defense. Because of the importance this issue may play in future deliberations on this bill, I would like to detail those reasons today.

At present, the qualified immunity defense tests the actions of defendant-employees against an objective standard of reasonableness. There is no liability if the employee's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." That is a quotation from *Harlow* v. *Fitzgerald,* 50 U.S.L.W. 4815, 4820 (6/24/82). I see no valid reason why this standard should not also determine the Government's liability. Absent this defense, a recovery could result whenever any violation of the Constitution occurs, notwithstanding the reasonableness of the Government agent's conduct.

Permitting the Government to be sued for constitutional torts without allowing it to assert the qualified immunity of the employee whose actions triggered the lawsuit would surely increase the amount paid in damages. Although it is impossible to predict the exact effect on the Treasury, the result would be akin to a no-fault compensation system. The number of cases filed would surely increase. It is conceivable that suits now properly brought under existing Federal Tort Claims Act provisions requiring a showing of negligence to recover damages would, through skillful pleading, be styled as constitutional torts. I think it is appropriate to point out that in drafting the early Federal Tort Claims Act, Congress took pains to insure that the functioning of government itself would not be disrupted or chilled by suits for money damages. The authority for that is in *Dalehite* v. *United States,* 346 U.S. 15, 28, 32 (1953).

Permitting the Government to assert this defense would, of course, mean that some injured plaintiffs would have no civil damages remedy. But, Mr. Chairman, that is the case now under *Bivens.* It is also true in ordinary tort law where damages are usually unavailable without at least a showing of negligence on the part of the defendant. Indeed, the existing Federal Tort Claims Act requires proof of negligent or intentional acts before the Government can be held liable for damages. It would seem inconsistent to now permit recovery based on the nonnegligent actions of a Government employee, who reasonably believed he was acting properly, simply because the alleged wrong finds some basis in the Constitution. I should reiterate, Mr. Chairman, that passage of this legislation would allow the Government to settle cases in which plaintiffs suffered constitutional injuries. Even with the availability of the qualified immunity defense, litigation may be a more expensive and less desirable alternative.

Mr. Chairman, I am also concerned about the public perception that could result if the qualified immunity defense was waived. There is a stigma attached to a finding of a violation of constitutional rights. This is justified under *Bivens* litigation because recoveries result only when employees do not act reasonably. However, were legislation to pass substituting the Government as defendant and disallowing assertion of the good-faith defense, it could be demonstrated after a passage of time that the courts had found an increase in the number of constitutional violations. While factually correct, it would be quite misleading and could lead to an erosion of public confidence in our governmental institutions and a lessening of employee morale.

I find this particularly troublesome in the law enforcement context. Federal criminal investigators, unlike many employees performing regulatory or administrative duties, often "have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." So found the Supreme Court in *Dunaway* v. *New York,* 442 U.S. 200, 213-214 (1979).

Decisions often must be made quickly under stressful circumstances. Yet the courts may take years to ultimately decide the constitutionality of an agent's conduct. This is particularly true in the area of search and seizure where the rules are far from clear and decisions may ultimately turn on whether the plaintiff had an expectation of privacy in the place searched—an issue which often depends on facts peculiar to the individual case. Governmental liability under these circumstances would often be inappropriate.

Mr. Chairman, the Bureau has enjoyed an excellent track record in defending *Bivens* suits. Of the hundreds of agents sued personally since *Bivens,* only three judgments—against seven agents—have been returned. Two of these cases are now on appeal. I am confident our agents will continue to respect the constitutional rights of citizens if this proposal becomes law.

Mr. Chairman, that is my statement, and I will be happy to respond to your questions.

Senator GRASSLEY. You just mentioned the hundreds of suits that have been pending against FBI personnel. Do you have a more exact number for us?

Mr. WEBSTER. Well, currently there are 63 suits pending, which includes 104 present employees and 40 retired or separated employees. I do not have an overall number over a specific period of time.

Senator GRASSLEY. Now to this very touchy issue of good-faith defense, would the Bureau oppose passage of a Federal torts claims bill which did not allow that sort of defense?

Mr. WEBSTER. Mr. Chairman, the Department is opposed to a bill that does not have a good-faith defense. And this bill has been up a number of times, through two administrations. My concern has been a legitimate one, and that is protection of agents. I am anxious to see this bill adopted in a form which provides the kind of protection that will best serve the American people. I would like to see it adopted in a way that is rational in relation to the interests of the American people in other areas.

I have outlined in my opening statement some of the problems that would, as I see it, ensue if the good faith defense were not included in the bill.

Senator GRASSLEY. You made mention in your testimony of *Harlow* v. *Fitzgerald,* and we know that in that case the Supreme Court redefined qualified immunity defense by removing the subjective element of the defense. The case involved a lawsuit against high level executive branch officials performing discretionary functions.

Have the lower courts applied this good-faith standard in suits filed against Federal law enforcement officials?

Mr. WEBSTER. That is my understanding, Mr. Chairman.

Senator GRASSLEY. Well, then has the new criterion resulted in an increase in the number of insubstantial lawsuits being dismissed on motions for summary judgment?

Mr. WEBSTER. We have not seen any appreciable difference in the number of lawsuits dismissed this way. There is still a lot of work to prepare a defense of this kind, even though the subjective aspect has been eliminated. The affidavits and other materials still take a substantial effort in order to dispose of it. But I do not think statistically it has had the effect of reducing the number of cases on summary judgment.

Senator GRASSLEY. In light of the Supreme Court's 1980 decision in *Owens* v. *City of Independence,* do you think that it would be appropriate for the Federal Government to assert the good-faith defense in constitutional tort cases?

Mr. WEBSTER. Well, I think we are talking apples and oranges, Mr. Chairman, because there has never been a tradition for immunity to municipal corporations. There is a longstanding tradition and legal basis for sovereign immunity, so far as the Federal Government is concerned. It has only allowed itself to be sued in ways in which it has expressly provided for such suits by statute.

So it is the sovereign granting the right to be sued on the Federal side. In the case of municipal corporations there never has been any such immunity from suit.

Senator GRASSLEY. I have no further questions, and I want to thank you for your testimony. I look forward to working with you as we hope this piece of legislation evolves through the legislative process.

Thank you very much.

Mr. WEBSTER. Thank you, Mr. Chairman.

Senator GRASSLEY. Our next witness is Roscoe Egger, who I have had an opportunity of hosting many times before a subcommittee of Finance, which I chair, the Internal Revenue Service Oversight Subcommittee. He has been very helpful to me in the legislation affecting the tax area, and this is the first time I have had an opportunity to invite Commissioner Egger to testify before this subcommittee.

I want to thank you for joining us, Commissioner Egger. After reading your testimony I am aware of just how vulnerable the Service is to *Bivens* actions, and we are very interested in hearing your testimony, please proceed.

STATEMENT OF ROSCOE L. EGGER, JR., COMMISSIONER, INTERNAL REVENUE SERVICE, ACCOMPANIED BY WILLIAM F. LONG, JR., ASSISTANT DIRECTOR, CHIEF COUNSEL'S GENERAL LEGAL SERVICES DIVISION

Mr. EGGER. Very well, Mr. Chairman. I certainly am pleased to be here to present our views on title XIII of the Senate bill S. 829. Title XIII would amend the Federal Tort Claims Act to make the United States the exclusive defendant for all torts committed by Federal employees within the scope of their employment and would, for the first time, make the United States liable for torts arising under the Constitution of the United States.

Title XIII of S. 829 would amend the Federal Tort Claims Act to provide the substitution of the United States for defendant employees acting within the scope of their employment in all suits alleging common law or constitutional torts. This title is the legislative successor to similar efforts dating back to the 95th Congress, and continuing through the 96th and 97th Congress as well.

The Internal Revenue Service strongly supports both the underlying philosophy and the goals of title XIII, and urges its favorable consideration and passage. We believe the bill provides the proper balance to government by eliminating personal liability without eliminating personal accountability. And in doing so, protects the legitimate interests of citizens and employees alike.

Mr. Chairman, your membership on the Finance Committee, and, in particular, your work as chairman of its Oversight Subcommittee, have afforded you ample opportunity to become familiar with IRS operations, as well as with the problems we face in carrying out our responsibilities for the tax administration system. However, the problems facing the Service in this area are sufficiently serious and in a sense unique—how many people would believe that this happens to Government employees—that I would like to take some time to explain why I feel this legislation is so important.

The harassment of Internal Revenue Service employees by tax protesters has become a serious problem. While this has been going on for many years, its frequency now seems to be increasing, and the tax protesters responsible for much of it appear to be becoming more organized and militant. The Service is just beginning the establishment of a comprehensive system for monitoring cases of this nature.

Harassment consumes time and energy which would otherwise be devoted to constructive Government service, and inhibits the efficient and effective administration of the Federal tax laws. For example, while the Service has been extremely successful at defending employees in frivolous suit proceedings, these proceedings place a considerable burden upon the resources of Chief Counsel and the Department of Justice.

Harassment also has a negative impact on the productivity of affected employees, as you might expect. In fact, it probably would not be an overstatement to say that it has had a chilling effect on Service employees, with a corresponding impact on our programs. While the largest number of these instances seem to involve our revenue officers, who are attempting to collect taxes owed, in total

they encompass all categories of IRS employees in offices throughout the country.

The types of harassment being experienced by our employees run the spectrum from late night phone calls to physical intimidation and assaults. Generally, though, they fall into the broad areas of nonviolent and violent harassment. A brief review of some recent statistics and cases in these areas may be instructive. As of May 1, 1983, there were 547 *Bivens* suits, all of which we believe to be frivolous, pending against some 1,360 IRS employees. To date, there have been no final judgments rendered against IRS employees in these suits. As you know, a *Bivens* suit refers to the 1971 U.S. Supreme Court decision in which it was held that a victim of a fourth amendment violation by a Federal official has a right to recover damages against the official individually in Federal court, despite the absence of any statute conferring such a right.

From the Government's point of view, defending against a frivolous *Bivens* suit entails a large expenditure of resources and a great deal of complexity. This, of course, is in addition to the suit's harmful effect on the morale and productivity of the employees involved. The amendments envisioned in title XIII would be of direct assistance with respect to the filing of constitutional and common law tort actions against employees.

The filing of baseless liens against IRS employees is another form of nonviolent intimidation often experienced. For example, between March 1982 and March 1983 alone, 9 taxpayers filed bogus liens against 329 IRS employees amounting to some $21 million. In one case in Texas, three taxpayers filed liens totaling $8 million against seven employees and the father of one employee—who owned property jointly with the IRS employee. Investigations on the three taxpayers and a fourth taxpayer, who delivered liens to the employees, have been accepted for prosecution; the action on that prosecution is expected in the next few weeks.

In another case from Texas, two taxpayers filed liens against two employees amounting to $72,000. A third taxpayer also filed a $50,000 lien against a county employee who had processed a levy filed by the IRS employee. An additional taxpayer was involved in the same case as a result of his serving liens on the employees for the other taxpayers. These cases have been accepted for prosecution and criminal actions are expected within the next 10 days.

While the provisions of title XIII would not directly impact the many cases of violent harassment that we are seeing these days, their enactment would send a strong signal to employees that their Government cares about them, and is acting to protect them. Let me give you just a few examples to show how serious a problem this is for us.

During fiscal year 1982, there were 513 instances where IRS employees were either physically assaulted or threatened with physical assault. This is an increase of 60 instances over the fiscal year 1981 level. Over the past 7 fiscal years, 3,647 cases of assaults and threats have been investigated by representatives of our Internal Security Division. Just last week, Mr. Chairman, one of our employees was shot while performing his duties in Cleveland, Ohio. According to information received from our central region, the em-

ployee is listed in fair condition in the intensive care unit. His assailant, being held on $100,000 bond, was indicted just 2 days ago.

In February 1982, a taxpayer assaulted a Milwaukee IRS district employee by striking him in the face and threatening him with a shotgun. The employee took refuge in the home of a neighbor of the taxpayer. Agents of the Milwaukee district arrived and escorted the employee from the area. The taxpayer was sentenced to 2 years in prison—21 months suspended, to serve 3 months in jail—2 years probation, and had to turn his weapons over to the county sheriff for 2 years.

In March 1982, a taxpayer was arrested by Montgomery County, Md., police officers for shoplifting. During questioning, the taxpayer related that he had been offered a contract to kill an IRS agent. The Montgomery County police contacted our Internal Security Division. When questioned by Division representatives, the taxpayer stated that he had been offered $5,000 and a weapon by another taxpayer to kill the agent in Washington, D.C.

Later, the taxpayer made a monitored telephone call to the other taxpayer, who agreed to meet him that afternoon to provide a weapon. During the meeting, which was monitored by IRS inspectors, the taxpayer provided a .38 special Smith & Wesson, six rounds of ammunition, the IRS agent's name and address clipped from a telephone book, and the description and license number of his automobile. Immediately following the meeting, the other taxpayer was arrested. He was eventually sentenced to 25 years in prison.

Efforts have been and are continuing to be made to deal with those who persecute our employees to keep them from performing their official duties. The Department of Justice, with the Chief Counsel's assistance, has been very successful in defending civil suits brought against employees, and in moving affirmatively in civil proceedings against individuals who are harassing employees through personal litigation. Court costs, attorney's fees, and injunctive relief are being sought.

Other efforts to protect our employees are now being made on two fronts. At the local level, our Internal Security function is preparing referrals of harassment cases to U.S. attorneys; Chief Counsel is also offering legal assistance once such referrals have been made. At the present time, several U.S. attorneys have indicated that they are very interested in prosecuting harassers in connection with baseless liens filed against employees. At the national level, Chief Counsel and Inspection are working with the Department of Justice in an effort to obtain increased prosecutions of taxpayers who harass Service employees.

To support these efforts, the Office of the Assistant Commissioner—Examination—has taken the lead in a Service-wide data collection effort to develop more detailed nonviolent harassment data, and to identify additional instances of criminal conspiracies. Chief Counsel and Inspection will ultimately ask the Justice Department to proceed with prosecutions of nonviolent harassers under existing statutes. In addition, Chief Counsel is researching various State laws to see if there are any statutes which permit successful prosecutions.

Mr. Chairman, the abuse and violence we see being directed at our employees seem to me the manifestations of a larger problem facing society as a whole—a decline in respect for public institutions, as well as those who serve them. It is obvious from those assembled here today that this problem extends far beyond the IRS, and probably beyond the Federal level as well. Both the electronic and print media have reported numerous instances where Government employees, in the performance of their official duties, were harassed, threatened, and attacked.

As tax collectors, we do not always expect to be popular with taxpayers; throughout history, the reverse has been true. But as a tax administrator, I am extremely disturbed at these recent developments and the problems they portend for the tax administration system. While tax collection is perhaps the least popular function of government, and certainly one of the most difficult to administer, it is probably the most important function, since without the revenues so collected all other operations would eventually grind to a halt. The proposed amendments in title XIII of S. 829 can help prevent that from happening.

As you are well aware, Mr. Chairman, additional taxpayer safeguards beyond those that already exist were included in the Tax Equity and Fiscal Responsibility Act [TEFRA] of 1982. We believe our employees deserve the same sort of benefits from law that taxpayers enjoy, and the provisions of title XIII would help accomplish that.

In a sense, these changes would parallel those included in new Internal Revenue Code section 7431, also added by TEFRA, which makes the United States the defendant in civil actions involving the unauthorized disclosure by employees of tax information under Code section 6103.

Mr. Chairman, I, or my associates here with me, will be pleased to try to respond to any questions that you or other members may have.

Senator GRASSLEY. I do have a few questions.

And I also might make an announcement that I ought to make at every committee meeting, that even though other members of the subcommittee are not here, any of the witnesses might expect other members to submit questions in writing and we would appreciate immediate response to those. And also the record will be open for a period of time for anybody to submit additions or different testimony for our consideration.

You mentioned in your testimony that as of May 1, this year, there were 547 *Bivens*-type suits lodged against 1,360 of your employees.

I would like to have you characterize how the bulk of these suits are styled in the plaintiffs' pleadings?

Mr. EGGER. I think that I better ask our representative from Chief Counsel to come up here and give you a more——

Senator GRASSLEY. Well, then while he is getting ready to answer that, then additionally, the extent to which the number of suits that may have arisen internally, for instance where an employee is suing a supervisor within your agency.

Mr. EGGER. I do not think that we have but a very, very few instances of that kind, Mr. Chairman; something like 1 percent.

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Senator GRASSLEY. Well, then I would ask my previous question about how the bulk of these suits are styled in the pleadings?

Mr. LONG. Basically what is happening is an individual who has had contact with an employee of the Internal Revenue Service—a revenue officer, a special agent, or a revenue agent—will go down to the Federal district court and put himself as the plaintiff in the action. He will list the individual agent or as many agents or representatives of the Internal Revenue Service that he has had contact with, as defendants in their individual capacity in this lawsuit, and will seek generally $200,000, $300,000, or $2 million in these actions.

Senator GRASSLEY. What internal procedure does the IRS have to discipline employees who do commit torts and other undesirable actions? My reason for asking that is central to the argument of whether or not you ought to make any changes in existing law and existing cases is whether or not there are adequate ways of disciplining employees, and the argument that they use that the present suits force discipline upon employees.

Mr. EGGER. I am really pleased to answer that because I think the Internal Revenue Service is unique, perhaps even among Federal agencies, in the aggressiveness and vigor with which we investigate literally any charge of misdoing or wrongdoing on the part of our employees.

We have an Internal Security Division, which is extremely active in investigations, and so when we get a complaint from a taxpayer that an employee has acted wrongfully or outside of the scope of his authority, et cetera, that case is immediately evaluated by our Internal Security Division. And if necessary, they proceed with a formal investigation.

We have had, from 1979 through fiscal 1982, 2,589 cases that were investigated by Internal Security. Of those, 1,513 were actually adjudicated. We have had out of that 1,513 some 17-plus instances where the employee was separated or resigned. We have had suspensions and/or reprimands in 565 additional cases.

So I believe we have an excellent record of showing a very, very quick response to any complaint that turns out to have a degree of legitimacy about it. I am very proud of the record that we have there in enforcing and requiring accountability on the part of our people.

Senator GRASSLEY. Well, this is a concern that we are going to have to satisfy and one that ought to concern all of us. On the other hand, I am not sure the extent to which threats of being sued serve as much of a discipline in the sense that that does not enter into people's thinking if they are legitimately pursuing their job and doing it in a fashion where they are devoted to doing their job well.

Does the IRS currently utilize hold harmless provisions?

Mr. EGGER. I do not believe we do.

Mr. LONG. There is a provision like that in this bill. We do not.

Senator GRASSLEY. So you do not use it?

Mr. EGGER. We do not at the present time, no.

Senator GRASSLEY. I have a question that Senator Laxalt would like to have your response to.

How many *Bivens* suits brought against the IRS have resulted in judgments against the employee? And I think you answered that, none. I remember that in your testimony.

Mr. EGGER. None, that is right.

Senator GRASSLEY. I have a situation in my own State of Iowa that I would like to mention for the record and ask for any comments you might have. I think this might dramatize some need for this legislation. It is an example of IRS personnel and individual Iowans who purchased the property that had been seized for payment of taxes owed by your agency.

Mr. EGGER. Yes.

Senator GRASSLEY. And they are being sued for $5 million in damages now. The plaintiffs in the case have sought liens on the individual properties. Many IRS personnel throughout the Nation face similar retaliatory action as you have suggested. And although all IRS personnel are entitled to counsel, the individuals who purchased the property at the forced sale must incur the cost of defending themselves and have personal property subject to lien.

We not only have the case of your employees being sued, but we will say you take a car and, I do not know what the process, but you put that car up for sale to get some money out of it. And the individual in Sioux City, Iowa, who bought the car is now being sued by the taxpayer who previously owned it. So that is the situation we are in.

Obviously, you know, I suppose the question is raised about whether or not the IRS agent did everything right, but this little innocent factory worker out here who bought the car is being sued. Now that is the situation we get into.

I guess the question I would like to ask is, how will the legislation before us remedy this situation?

Mr. EGGER. I am not at all sure that title XIII covers that situation, except that it does make the United States exclusive defendant in all tort actions. The bill does not provide for the substitution of the United States as a defendant for non-Government personnel.

I should tell you that my understanding is that the Department of Justice has agreed to defend that particular individual.

Senator GRASSLEY. They have now agreed to that?

Mr. EGGER. That is my understanding. They have now agreed to do that, and although it poses some rather serious legal problems, from the standpoint of the relationships, nevertheless they have agreed to defend in that particular instance.

Senator GRASSLEY. How recently was that decision made?

Mr. EGGER. Only last week.

Senator GRASSLEY. Last week?

Mr. EGGER. Yes.

I am reminded that the Department of Justice is also defending the independent contractors which we retained, too, in connection with the seizure of property. This is fairly typical where we have the seizure of heavy equipment or something of that sort, because we do not have the capability to move that sort of thing. We retain independent contractors, and in this instance they, too, were sued, and the Department of Justice is defending them.

Senator GRASSLEY. Commissioner, I want to thank you for your participation, and we will probably be talking to you on this sub-

ject, as well as a lot of tax legislation, in the short term. Thank you very much.

Mr. EGGER. Thank you, Mr. Chairman.

Senator GRASSLEY. Our next witness is the Chairman of the Administrative Conference of the United States, Loren Smith.

I welcome you, Loren, and I appreciate your participation, not only in this but the many other times you have been so helpful in coming before subcommittees of the Senate, and specifically this subcommittee.

I would ask you to proceed on the same basis as before, only the extent to which your testimony is quite long, to be sure to summarize.

STATEMENT OF LOREN A. SMITH, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY RICHARD K. BERG, GENERAL COUNSEL; AND CHARLES POU, JR., STAFF ATTORNEY

Mr. SMITH. Senator, thank you very much, and we appreciate the opportunity to be here.

The Conference is in some ways a reactive organization. We are a place that reacts to the current problems that are seen by the other parts of the administrative system and the Congress, and we fulfill our function best when we are able to provide technical expertise on the functioning and nature of the whole Federal system. And to the extent that we are responsive to the committee's interests in this matter, then we are doing what we get paid to do.

I would like to introduce, at the table with me, the general counsel of the Conference, Dick Berg, and our staff attorney, on my left, Charlie Pou, who has worked on this particular project.

CONFERENCE RECOMMENDATION ON OFFICIALS' LIABILITY

I know that there are a number of distinguished witnesses who can add much to this, so I will try to briefly summarize a few of the comments I have made and that are more fully set out in my written statement.

The issue of officials' liability was discussed and debated before the Administrative Conference on December 16, 1982, at our last plenary session. The issue provoked lively and heated debate among the members of the Conference who represent all the major executive branch and independent agencies and, as well, are members of the public drawn from both academia and the bar. The Conference adopted a recommendation which in a number of ways closely parallels the bill that you have introduced. And as Chairman of the Conference, on behalf of the Conference, I strongly favor the amendments to the Federal Torts Claims Act that are embodied in title XIII of S. 829.

S. 829'S EFFECTS

The Conference's mandate is to make the administrative process a bit more clear and more efficient, and I think that the amendments that you have introduced to the Federal Torts Claims Act will serve both of those purposes. It seems to me that there are really three crucial goals of this act and of the Government in deal-

ing with this problem. One is the elimination of unconstitutional conduct by Federal employees. The second is making individuals accountable for wrongs that they have committed. And, third, is compensating legitimate victims of constitutional violation and abuse.

The bill, S. 829, serves all three interests by substituing the Federal Government, which is a responsible defendant, for what may or may not be a responsible defendant. The Federal Government insures financially that compensation will occur. By the provision of the bill creating a duty on the part of the agency to report to the Attorney General on the disciplinary procedures against employees who have violated Federal law, deterrence is served. And accountability is served.

GOOD-FAITH DEFENSE

Let me also note a couple of other things in summary with respect to a couple of the issues that came before the Administrative Conference. There was relatively broad, I would wager to say, almost unanimous support for the concept of substituting the Federal Government for the employee. And the breadth of that support in a group as diverse as the Administrative Conference was evidence to me that this bill is needed and that a legislative solution to this problem is long overdue.

The real debate focused around two types of issues. One was clearly on the issue of whether, when the Government was substituted for the individual defendant, the Government could assert the good faith or the qualified immunity defense. The Conference voted relatively narrowly and somewhat divided, but with a majority, for retaining the good-faith quality immunity defense when the Government was substituted. I feel strongly that that was a right decision by the Conference, and that it makes sense for several reasons. If the goal of deterrence is really to be furthered, then strict liability undercuts that. Deterrence, I think, is based in part on the idea that people who are guilty of conscious actions are going to in some way be deterred because they will know that if they commit a violation of law, they are going to be punished in some way, either by stigma, by financial penalty, or by personnel discipline.

If you substitute a strict liability, and in effect get rid of the good-faith defense, really changing the rule to strict liability, then you are eliminating the deterrence because you are eliminating the stigma. The employee then found to have violated the Constitution might even have acted inadvertently and in good faith. He would be treated similarly to a willful malefactor who had just ignored the constitutional rights of the citizen. So it seems to me that in order to serve truly the interest of real deterrence and the interest of justice, the good-faith qualified immunity defense is an important part of the system, and an important part of the process.

One additional thing that I did not note in my testimony, but that struck me in thinking about it as the other witnesses testified, is that the interest of due process are served in an important way by the retention of the good-faith defense. If the good-faith defense is stricken from the Government's arsenal, then, in making these decisions, that is going to have an input in the courts and it is

going to have some role in deciding whether a constitutional tort has been committed or not. So a court that knows the Government is morally not liable, because there was good faith, is likely to distort its final outcome and come up with a decision finding that there was no constitutional liability. And that is not the basis in which the court should act.

AGENCY DISCIPLINARY PROCEDURES

The other issue that the Conference debated extensively was the question of agency discipline and how employees who had violated the Constitution or committed a constitutional tort should be dealt with if the Government was substituted in their place. The committee of the Conference that considered this particular recommendation discussed this at some length, and there was no indication in the view of members of the committee—and our committees are made up of both agency officials and members of the public and we have kind of a good mix on all committees—that there is a significant problem. The cases just are not there of an employee who had egregiously violated the Constitution and was not properly disciplined.

In fact, as was indicated by the two earlier witnesses, the reality of this matter is that there are very few cases that really raise the specter of a Federal employee violating the constitutional rights of a citizen. I think, in the absence of any real strong data showing that the agencies are not doing their jobs, the suggestion in the bill which was not considered by the Conference—in this way I am speaking only for myself—makes a lot of sense to me.

Senator, I will be happy to answer any questions that I can, and I thank you for this opportunity.

CONFERENCE'S PROCESS

Senator GRASSLEY. What are the steps in the deliberation by your conference as you look at a recommendation like this?

Mr. SMITH. The first is a report by a consultant, and our consultant on this report was Tom Madden, who will testify later on this morning at this hearing. Tom produced a report which I think was a fine document; in fact, I have a copy and I think the staff of your committee has copies of the document. It is a report to the Administrative Conference. The report includes a draft recommendation which the Conference committee may accept, reject, or modify.

After Tom Madden's report was submitted, it was sent to a committee, our Committee on Administration, which includes about a sixth of the Conference.

The committee met three or four times, debated the issue and came out with a draft recommendation. The draft recommendation differed on one significant degree from the consultant's report, and that was on the issue of good faith. The good faith qualified immunity defense. The committee felt that it should be retained.

Am I correct on that?

Mr. POU. The committee felt it should be kept but the full Conference changed that.

Mr. SMITH. The committee agreed with Tom Madden that the good-faith defense should be waived by the Government. The next

stage of our process is the Council of the Conference, which is a Presidentially appointed body of 10 members plus myself, equivalent really to a Board of Directors of the Conference. Five of its members are from the Government, and five are from the private sector. The Council met and strongly voted to amend the recommendations, striking the provision that would eliminate the good faith defense.

So the Council's view was that the good faith defense should be retained by the Government.

The full Conference debated the issue and agreed with the Council and agreed that the good-faith defense was an important part of any solution to this problem. The Conference is made up of 91 members, and the Conference meets semiannually to consider such matters.

I should add one quote that came up in the debate that I think was significant on this particular issue. Judge Jerre Williams of the Fifth Circuit Court of Appeals, who was the first chairman of the Administrative Conference appointed by President Johnson, noted in the debate that "the biggest misstatement that I have heard here today is that a public official who is reasonably well versed on his job knows what the law is. There is no way anybody can know what the law is until you finally count it up in the court of last resort, where it is a split decision typically."

JURY TRIALS

Senator GRASSLEY. Why did your Conference decide against a jury trial for these types of actions?

Mr. SMITH. That was really not debated on the floor of the plenary session, and I can only speculate on the different reasons. My guess is that it was that the administration of justice has become enormously cumbersome. The cost of litigation imposed on this society is tremendous. Having had a little experience as a prosecutor, I know that a jury trial is enormously expensive as compared to a trial by judge. And some of the significant issues in this area are legal issues rather than the issues of fact.

Senator GRASSLEY. Do you believe that we might potentially lose a deterrent function by substituting the liability of the Government for that of the employee?

Mr. SMITH. If we did not retain the good-faith defense, I think we would lose a deterrent function. I think, in fact, if this act is passed as you have written it, we will be gaining deterrence. We will be providing real monetary compensation, and we will be providing a fair adjudication of the issues.

WILL LITIGATION INCREASE OR DECREASE

Senator GRASSLEY. If the United States becomes the defendant, do you have any views as to whether we will see the development of a larger bar litigating constitutional tort cases in light of the U.S. financial resources compared to that of the individual?

Mr. SMITH. I think not. I think in part the frivolous suits will decline. I think a lot of the motivation for litigation now is the club that this gives the plaintiff over a relatively helpless Federal employee defendant. There is one general counsel or deputy general

counsel of a department who indicated that in a couple of the suits that they had pending they really were motivated to settle not because of the chance of losing but because of the difficulty of fighting the case.

As an example, a foreman fired a thug for beating up other employees, about 4 or 5 years earlier. This individual had retired, had been a GS–8 level, had retired and was living off his Federal pension and not of any significant financial means. The person then, after this period, claimed that the real reason that he had been fired was not because he was a thug but because he was exercising his first amendment rights on some issue or another, and having to prove this in court after 4 years was kind of difficult. It would have been an involved case, and the Department just did not feel it was fair or honorable for the Government to risk this retired Federal employee's home and his whole retirement just on the basis of litigating, and so they settled the case.

Senator GRASSLEY. Those are all the questions I have. I want to thank you, Chairman Smith, for your testimony at this time, as well as at other times, and I appreciate it and probably will be calling upon you again.

Mr. SMITH. Thank you very much, Senator, giving advice is what you pay us to do when you appropriate our moneys. So we are happy to do that.

[The prepared statement of Mr. Smith follows:]

Prepared Statement of Loren A. Smith

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

My name is Loren A. Smith, and I am the Chairman of the Administrative Conference of the United States. With me here today are two members of my staff, General Counsel Richard K. Berg and Staff Attorney Charles Pou.

Mr. Chairman, I welcome this opportunity to testify in support of the major provisions of Title XIII of S. 829, which would amend the Federal Tort Claims Act to provide that the United States shall be the exclusive defendant in all tort claims based upon actions of Government employees taken within the scope of their employment. My agency over the past two years has closely examined the existing system of individual employee liability, as developed piecemeal by the courts, and concluded that it has failed to fulfill any of the crucial goals of deterrence, accountability, and compensation that it was erected to serve.

First, the present system does not meet even the basic goal of assuring adequate compensation for victims of official violations. Most individual employees defendants would be unable to pay any substantial judgments against them.

Even more important, the existing remedy does not provide the kind of measured deterrence anticipated by the courts. The ever-present vulnerability to lawsuits for monetary damages does far more than deter improper conduct by Government employees; it also discourages prompt, vigorous decisionmaking. Even the best-intentioned officials may choose inaction rather than risk in making a difficult, sensitive decision (so often inherent in Government service) that is likely to arouse the ire of persons disadvantaged thereby. This reluctance to act vigorously inevitably hampers the effectiveness with which federal programs and laws are administered; when a Government inspector refrains from enforcing the law or an official fails to discipline a malingering subordinate for fear of retaliatory litigation, the public interest and agency morale suffer.

Besides inhibiting Government employees from making controversial decisions on their merits, this potential liability can also subject conscientious officials to very real financial and other burdens for years after they leave Government. To take one example, shortly after the Conference began its project in this area, I talked to former Attorney General Edward Levi and asked him if he might be interested in helping us. He told me that he could not, because at that

time (January 1982) he still had at least ten lawsuits pending against him personally from his stint as Attorney General — which had ended in 1977. He also told me that he had already spent well over $100,000 of his own money for legal representation in addition to what the Justice Department had provided. Thus, even though federal officials have been vindicated in all but a very few of the suits brought against them, the potential for expensive, time-consuming litigation presents a very serious burden. I understand that some highly-qualified persons have been deterred from entering public service because of this prospect.

Finally, the federal Government often has interests at stake in constitutional tort litigation involving its officials that may not be represented adequately when individual officials themselves are the defendants on trial. This difficulty, compounded by the cost to the Government of hiring outside counsel to represent its employees in many cases, needlessly complicates trials and burdens taxpayers.

Recognizing the inadequacy of the current scheme, the Administrative Conference last December called on the Congress to replace the existing system by accepting Government liability for wrongs done in the public's name and by strengthening the means of dealing with wrongdoers. Specifically, the Conference recommended enactment of legislation substituting the United States as the exclusive party defendant in all actions for damages alleging constitutional violations committed by federal executive branch officers and employees* while acting within the scope of their office or employment. I have attached a copy of ACUS Recommendation 82-6, Federal Officials' Liability for Constitutional Violations, to this testimony.

While there was a broad consensus among all segments of the Conference's membership, from both Government and the private sector, that the United States, and not individual Government employees, should bear responsibility for constitutional violations, a number of related questions provoked lively debate among the Conference's 90 members. Indeed, as the recommendation passed through the various stages of the Conference's deliberative process, the positions

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* Since the Administrative Conference's mandate extends only to matters affecting the administration of federal agencies' programs, our recommendation addressed only actions against executive agency officials. The Conference did not intend to suggest, however, that the same considerations do not apply to officials of the legislative and judicial branches as well.

on several of these difficult issues were substantially modified or even reversed, often more than once.

One area of controversy involved the question of whether jury trials should be provided. The Conference concluded that claims arising after the effective date of legislation like S. 829 should be decided by the court rather than a jury. Only for claims that arose prior to that date should the opportunity for jury trial be preserved.

Considerably more controversial was the question of what additional administrative measures were necessary to deter improper conduct once the deterrent of individual liability had been removed. The Conference finally decided that existing deterrents — such as the criminal laws, agency disciplinary proceedings and performance appraisals, inspectors general, concern for professional reputation, court challenges seeking injunctive relief and congressional oversight — were adequate to deal with behavior violative of the Constitution. By a narrow vote, the membership rejected a proposal that would have vested in the Office of the Special Counsel of the Merit Systems Protection Board authority to investigate alleged improprieties and to recommend appropriate action to the head of the employing agency. Rather, the Conference expressed the view that it would be beneficial to enhance the means of dealing with wrongdoers by having the Office of Personnel Management assure, via guidance promulgated through the Federal Personnel Manual and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions on officials and employees who have violated any person's constitutional rights.

Of the complex questions in this area, none was, and is, more controversial and consequential than that of whether the Government, in defending against constitutional tort claims under a revised system, should be permitted, as provided under Title XIII of S. 829, to assert any immunity or good faith defense now available to the individual employee whose conduct gave rise to the suit. These would include, of course, any qualified or absolute immunity presently available to the employee, as well as the employee's reasonable good faith belief in the lawfulness of his or her conduct.

Ultimately, the Conference decided that the better course is to permit the Government to assert these defenses and immunities. Notwithstanding the merit of many of the arguments forcefully set forth by the minority, the Conference

concluded that in cases involving constitutional claims — where the applicable doctrines are at best vague and at worst constantly shifting, where monumental decisions applied retroactively could subject the Government to massive liability to tens of thousands of persons for actions thought to be perfectly appropriate when taken, and where complex legal doctrines can be translated into day-to-day operating instructions only with the greatest difficulty, if at all — an absolute liability standard requiring omniscient decisionmaking would prove unworkable. Unwitting violations of constitutional rights do occur, for a variety of reasons, and it would be wrong to decide in advance that they should all be compensable. As Judge Jerre Williams of the Court of Appeals for the Fifth Circuit, a predecessor of mine as Chairman of the Conference, stated in the debate over Recommendation 82-6, "The biggest misstatement that I've heard here today is that a public official who is reasonably well-versed on his job knows what the law is. There is no way anybody can know what the law is until you finally count it up in the court of last resort — where it is a split decision, typically." Given this uncertainty, these defenses and immunities appear necessary.

Moreover, absent the good faith defense, successful plaintiffs might be unjustly enriched in cases where an action was presumed proper. To take one example, standards of treatment for mentally ill persons are in constant change, and some recent theories have given rise to constitutional decisions that certain approaches to treatment are improper. Certainly, it does not make sense to compensate everyone who, as a result of changed medical and legal perspectives, was found to have received treatment that was standard procedure when undertaken, but subsequently ruled inadequate. Similarly, absent a good faith defense, every suspect and felon subjected to a search later found improper — for technical or whatever other reasons — would have a claim for damages. This problem would be aggravated by Title XIII's provision for liquidated damages. The only way to prevent an even greater degree of "government by litigation" than exists now — particularly once the deep pocket of the federal Treasury is substituted for the shallow one of the individual employee, with the likely attendant broadened scope of responsibility and increased number of lawsuits that a similar shift to enterprise liability for corporations has produced — is to ensure that actions taken by officials in good faith do not lead to fiscal liability.

I will now be happy to answer any questions that you may have.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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OFFICE OF
THE CHAIRMAN

RECOMMENDATION 82-6

FEDERAL OFFICIALS' LIABILITY FOR CONSTITUTIONAL VIOLATIONS

(Adopted December 16, 1982)

This recommendation focuses on the increasing risk to federal executive branch officials of civil liability for monetary damages for alleged violations of federal constitutional rights. This vulnerability has expanded dramatically in recent years, as a result of judicially-discovered rights enunciated in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and subsequent court cases involving allegations of official misconduct. Under the present system of officials' liability, as developed piecemeal by the courts, an individual federal employee (except certain categories of officials, including the President, who have been ruled to have absolute immunity) may be held personally liable for acts that, though committed while the employee was acting within the scope of office or employment, may subsequently be found to violate a constitutional provision. Juries may hold officials liable for actual damages where they cannot show that their actions were taken in good faith — that is, in the belief that their conduct was lawful — and for punitive damages where they are shown to have acted maliciously or with reckless disregard of the plaintiff's constitutional rights. At present, damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may or may not be stated against the Government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680.

The existing system of civil sanctions for constitutional violations by federal officials does not provide adequate assurance of compensation for victims of such violations and discourages proper conduct by Government officials. In addition, the federal Government often has interests at stake in constitutional tort litigation involving its officials which may not be represented adequately when individual officials themselves are the defendants on trial.

In Carlson v. Green, 446 U.S. 14 (1980), the Supreme Court suggested that the courts may properly refuse to entertain monetary damage actions against federal officials if Congress has expressly substituted a different remedy or made available an alternative to the Bivens remedy. In the Conference's view, such an alternative system is likely to improve the effectiveness with which federal programs and laws are administered.

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional violations assertedly committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace the existing system by accepting public liability for wrongs done in the public's name and by strengthening the means of dealing with the wrongdoers. When defending against constitutional tort claims, the Government should be able to assert any immunity or good faith defense available to the officials.

Since the Conference's mandate extends only to matters affecting the administration of federal agencies' programs, this recommendation addresses only actions against executive agency officials. We do not intend to suggest that the same considerations do not apply to officials of the legislative and judicial branches.

RECOMMENDATION

1. Congress should enact legislation providing that the United States shall be substituted as the exclusive party defendant in all actions for damages for violations of rights secured by the Constitution of the United States committed by federal executive branch officers and employees while acting within the scope of their office or employment. The legislation should provide adequate procedures to ensure that, where a

damage action for violation of such rights is brought against an executive branch officer or employee, such action should be deemed to have been brought against the United States upon certification by the Attorney General that the defendant officer or employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. The Attorney General's failure to make such certification should be judicially reviewable.

2. Such legislation should provide that, in actions alleging constitutional violations, the United States may assert as a defense any qualified immunity or good faith defense available to the executive branch officer or employee whose conduct gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct. The United States should also be free to assert such other defenses as may be available, including the absolute immunity of those officers entitled to such immunity.

3. The agency that employed the offending official should be responsible for investigation and, where appropriate, for disciplining the official and implementing any other appropriate corrective measures. The Office of Personnel Management should assure, via guidance promulgated through the Federal Personnel Manual and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions on officers and employees who have violated the constitutional rights of any person. Employees should be permitted to assert as a defense in any disciplinary proceeding their good faith in taking the action in question, as well as such other defenses as may be available.

4. Congressional legislation should preserve the opportunity for jury trial only with respect to claims that arose prior to the effective date of the legislation implementing this recommendation.

Senator GRASSLEY. Our next witness is Mr. Paul J. McGrath, Assistant Attorney General, Civil Division of the Department of Justice.

Paul, I want to thank you, as I thanked all the previous witnesses, for the number of times that you have been so faithful in responding to our requests for information. You have had great insight into most of the issues that we have discussed, and I want to say thanks and ask you to proceed.

STATEMENT OF J. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. MCGRATH. Well, thank you very much, Mr. Chairman. I am certainly pleased to be here this morning to testify in favor of title XIII of S. 829, the Comprehensive Crime Control Act.

I would appreciate it if the committee would include my prepared remarks as part of the record of this hearing, and I would like to just touch on a couple of points that seem to me particularly significant.

As the committee is aware, the Department of Justice has strongly supported in the past, and continues to support, the amendment to the Tort Claims Act, which is included in this legislation. The legislation is sorely needed. The current state of the law is very detrimental to the efficient operation of the Government. We do not have an exact count, but there are as many as 10,000 cases that have been brought against individual Federal employees on constitutional law theories since the *Bivens* case was decided 12 years ago. Those employees, of course, almost without exception, face these lawsuits without any insurance and with no indemnity, unlike employees of almost any other organization.

Most of the lawsuits are frivolous. To date there have been only 12 judgments which have survived posttrial motions and appeal. Yet the very pendency of these lawsuits is a problem. There have been instances where the defendants in lawsuits who have tried to get mortgages on houses have had difficulties because of the pendency of the suit. And that kind of problem is surely a major one. Of more concern is that the threat of lawsuits may deter vigorous action by Government employees and may even keep good people from going into Government at all. Just as troublesome is the fact that the current state of the law does not provide any real chance of recovery for those who indeed are injured by the misconduct of Government employees. If an individual is harmed by the misconduct of a Government employee, sues, is successful in getting a judgment, his or her chances of recovering against a Government employee are very small, because a typical Government employee does not have the money to pay any—at least any substantial judgment.

If the statute is enacted, it would alleviate the disruption that the current state of the law has on the Federal work force and would provide a remedy for those who have been injured by the misconduct of Government employees.

There is one issue, Mr. Chairman, which I would like to address briefly, and that is whether the good-faith defense should be included in the amendment if it is passed. The Department of Justice feels very strongly that it should be included as, of course, it is in S. 829. In our view, the good-faith defense does nothing more than to provide statutory support for the proposition that there should be recovery only where there has been some misconduct of a Government employee that has led to injury; that is basic to tort law. It is certainly basic to the Tort Claims Act; the Government is liable only where there has been misconduct.

All the good-faith defense really does is to provide that where the act of the governmental employee was unreasonable, there should be liability. And this is not just a theoretical point. Were it not for the good-faith defense, there is a real risk that there would be liability against the Government, against the taxpayers in many cases where at least to us that makes no sense.

Let me just give a couple of examples which I believe illustrate the problem. Let us say that an individual defendant in a criminal case is successful on a motion to suppress early on in the case. He is successful on the ground that the evidence was wrongfully seized in violation of the fourth amendment, but let us also assume that the conduct in question did not involve any wrongdoing on the part of the officer, that he was acting on a good faith belief as to what the law was. But as we all know, the law in this area is changed very often by the Supreme Court; it decides some very difficult questions and comes out in ways that most of us could probably not predict.

The individual in this criminal case is convicted, let us assume. It would seem to us a gross miscarriage of justice if that individual were then able to turn around and sue the Government and collect damages because of a technical finding that the fourth amendment had been violated.

For another example, let us assume that the Supreme Court were to decide several years from now that it was a violation of the eighth amendment if Federal prisoners were put into cells with a coconvict. Under this statute, if there was no good-faith defense, there would be a risk that every single Federal prisoner imprisoned today would have a cause of action for tort against the United States because of what now is certainly an unlikely decision by the Supreme Court. And yet, this statute would virtually provide a guaranteed, no fault recovery for anyone who was in the fortuitous situation of having been subjected to some governmental conduct which was pursued in good faith, a good-faith belief as to what the law was, which good-faith belief turned out after the fact to be wrong.

We believe that it makes no sense as a matter of tort law to come to that result through this legislation, through eliminating the good-faith defense. And we believe that the result of subjecting taxpayers to such a burden should be avoided.

Mr. Chairman, we urge enactment of this statute, and I would be happy to answer any questions that the committee may have.

Senator GRASSLEY. Is there any compromise, in your judgment, between allowing the Government to utilize a good-faith defense versus no accessibility to the defense?

Mr. MCGRATH. Well, I think it is very difficult to compromise it, for this reason. The kinds of situations that come up are so varied that it is hard to think of a compromise that makes very much sense.

Let me give you an example. A lot of the cases that have been brought, particularly over the last few years, involved regulatory actions by various branches of the Federal Government. They involve such activities as granting or withholding licenses, granting or withholding permission to market products; or either providing or not providing some kind of pest control or other crop or animal services. In all of those situations, we believe a good-faith defense, an absolute good-faith defense is critical. Otherwise what you would have is citizens collecting in tort from the Federal Government where the courts second-guess whether the individual Government employee had acted in accordance with the law or not.

It is difficult to imagine any compromise of a good-faith defense that would provide for a sensible solution of those kind of tort cases. I think it is also clear in the law enforcement area that it is critical that the law enforcement officers have a complete good-faith defense, because there would be nothing more troublesome than to provide for a lessening of that defense which might make law enforcement officials less apt to act in a fashion that would be decisive.

And although some of the critics to the good-faith defense say there is a great need to compensate victims of outrageous activities by individual law enforcement officers, our answer to that is the good-faith defense is not a shield behind which law enforcement officers may hide, where they have indeed acted in an outrageous fashion or have engaged in misconduct.

In short, I do not think that there is a compromise that at least I know of that makes any sense. And the good-faith defense is really very important.

Senator GRASSLEY. Let me ask you the tough one.

Will the Department oppose passage of a bill that does not contain a good-faith defense?

Mr. MCGRATH. We have not stated a position on that. Our current view is that we would rather have no bill than a bill that has no good-faith defense in it.

Senator GRASSLEY. Also, we need some examples of cases where the Department has refused to represent the defendant employee. In other words, where that conduct has been out of what is referred to as the scope of employment.

Mr. MCGRATH. Well, it happens a fair amount. I am not sure that this is a good example but it is this week's example. Two employees of a department got into a fight in the middle of the workday. One of them sued the other, and the agency asked us to represent the defendant in that case. We declined on the ground that a fight between coemployees, are not within the scope of one's employment, at least not in our view.

Cases which perhaps are more apt, have involved, for instance, an improper use by a Border Patrol agent of his firearm to stop a vehicle that was speeding. This is clearly in violation of the Service's regulation, clearly an outrageous act; and, in our view, clearly not within the scope of employment. We declined representation.

In short, where the activity is without the scope of employment, in our view, we decline representation even if the agency has certified that the action is within the scope of employment of the person.

Senator GRASSLEY. You might send us up a longer list of examples.

Mr. MCGRATH. Yes, I will be happy to.

Senator GRASSLEY. One final question.

Of those 16 cases where there have been convictions, or judgments, how many of those are on appeal?

Mr. MCGRATH. I hesitate to give you an answer to that. It is only several. I would rather supply that for the record. It is only a few.

Those 16 cases are listed in the footnotes to my testimony, and I would rather give you a current answer to that in writing.

Senator GRASSLEY. Well, then I thank you for your testimony once again. I appreciate your cooperation very much. You will be one that for certain we will be working with as we develop this legislation.

Mr. MCGRATH. Thank you. I look forward to doing that, Mr. Chairman.

[The prepared statement and subsequent letter of Mr. McGrath follow:]

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PREPARED STATEMENT OF J. PAUL MCGRATH

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE.

I am pleased to appear before your Subcommittee in support of Title XIII of S. 829, the Comprehensive Crime Control Act proposed by the Administration which would make the United States the exclusive defendant for all torts allegedly committed by federal employees within the scope of their employment and would, for the first time, make the United States liable for alleged torts arising under the Constitution of the United States. The bill would provide for the substitution of the United States for defendant employees acting within the scope of their employment in all suits arising out of such allegations. The Bill constitutes a significant, equitable and badly needed reform of federal tort law.

I note that you have introduced S. 775, a bill which is similar to Title XIII of S. 829. I want to express our appreciation for your efforts both in this Congress and in the last Congress in support of the enactment of legislation in this area. The need for this legislation has been expressed from so many quarters and for such a length of time that it can fairly be called a bipartisan proposal. During the last Congress, a compelling record for the legislation was developed under your leadership. We are thus of the view that the case for S. 829 has been made.

To summarize, the current state of federal tort law, at least in the area of the constitutional tort, is unsatisfactory from the perspective of every participant. Since the Supreme Court announced that a cause of action was available against individual federal officers in 1971; 1/ federal employees at every level of government have been the subject of an increasing number of suits filed personally against them. They are being sued for doing no more than carrying out the duties which Congress and the President have ordered them to perform. In a society where virtually every other identifiable group is protected by some form of indemnity, insurance or rule of law, this exposure

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1/ Bivens v. Six Unknown Named Agents Of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

to personal financial ruin is shocking and unconscionable. In reflecting upon this, one United States District Judge has been moved to comment, "The effect of this development upon the willingness of individuals to serve their country is obvious." 2/ If, as opponents of this legislation maintain, deterrence is the object of such personal suits, that which is deterred is competent government. Effective action in all areas is chilled. Resources and talent are diverted. Careers are shortened, recruitment discouraged, endless nonproductive litigation encouraged. 3/

Despite the ability to sue federal employees, the claimant, who may have a meritorious claim of governmental misconduct in violation of his constitutional rights, in practical terms has virtually no remedy. As a result of the sound doctrine of sovereign immunity, the United States cannot be sued for a constitutional tort because it has not consented to be sued. 4/ As a result, a plaintiff frequently faces enormous problems in attempting even to achieve service of process and jurisdiction over individual defendants and may only look to the individual assets of those persons should he obtain a judgment.

Despite the fact that there is no hope of meaningful monetary recovery, suits continue to be filed at an alarming rate. It appears that they are often prompted by reasons other than money damages: personal revenge or harassment upon a public official, an attempt to influence governmental action or as a means of collateral attack upon an otherwise legitimate criminal or civil enforcement effort. The proportion of recoveries to the number of law suits filed also demonstrates that federal public servants

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2/ Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979), Judge Gesell concurring.

3/ See, Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, Ninety Seventh Congress, on H.R. 24, October 13, 1981; May 19 and 20, 1982.

See also, Hearings before the Subcommittee on Agency Administration, Committee on the Judiciary, United States Senate, Ninety Seventh Congress, on S. 1775, November 13 and 16, 1981; March 31, 1982.

4/ See, Duarte v. U.S., 532 F.2d 850 (2d Cir. 1976); Norton v. U.S., 581 F.2d 390 (4th Cir. 1978); Ames v. U.S., 600 F.2d 183 (8th Cir. 1979); Jaffee v. U.S., 592 F.2d 712 (3rd Cir. 1979); Baker v. F. & F Investment Co., 489 F.2d 829 (7th Cir. 1973).

rarely violate the rights of their fellow citizens. Our records indicate that of the thousands of lawsuits that have been filed, only sixteen have resulted in a judgment and, of those, we believe that only six have ultimately been paid. 5/ Thus the current threat of personal lawsuits under which public employees must now operate is unfair and unjustified. I cannot overemphasize the severe disruption that these lawsuits cause in the lives of federal employees and their families.

The American citizen and taxpayer is not being well served by the current state of the law. The system for redress is not functioning and conscientious federal employees are traumatized

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5/ Askew v. Bloemker, S-CIV-73-79 (S.D. Ill., Sept. 29, 1978). DEA agent was held personally liable for violating the Fourth Amendment rights of three plaintiffs by conducting a search without probable cause or a warrant; the jury awarded damages of $22,000; plaintiffs agreed not to enforce the judgment against the uninsured federal agent but rather to proceed against defendant state employees who were insured.

Seguin v. Hightower, No. C76-182-V (W.D. Wash., Oct. 24, 1978). Customs agent held personally liable to the owner of an impounded car used in a smuggling scheme because the agent delayed four and one half months in initiating forfeiture action; the court awarded the plaintiff $7,300 for the rental value of the car plus consequential damages.

Jihad v. Carlson, CA No. 5-71-805 (E.D. Mich., Oct. 18, 1976). Prison guard held personally liable for $992 to inmate for violating his right to religious freedom in placing him in segregation for refusing to shave his beard; the judgment was reversed on appeal.

Weiss v. Lehman, CA No. 375-36 (C.D. Idaho, July 14, 1978). Forest service ranger ;held personally liable for $1,000 for violating plaintiff's Fifth Amendment rights by destroying property owned by plaintiff which had been apparently abandoned; the Ninth Circuit Court of Appeals affirmed the judgment. A Petition for Writ of Certiori was filed in the Supreme Court. The Court granted the petition and remanded the case for reconsideration (No. 80-2159, Oct. 5, 1981) in light or Parratt v. Taylor, 49 USLW 4509, May 18, 1981. The Ninth Circuit Court of Appeals then reversed and entered judgment for the defendant from which the plaintiff, in turn, appealed to the Supreme Court.

Halperin v. Kissinger, 424 F.Supp. 838 (D. D.C. 1976) and 434 F.Supp. 1193 (D. D.C. 1977). Former President Richard Nixon, H.R. Haldeman and John Mitchell held personally liable in damages for violating plaintiff's Fourth Amendment rights in authorizing wiretaps.

Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977). Chiefs of U.S. Capitol and D.C. Police held personally liable for arrests at Capitol Building during anti-war demonstration in class action with 1,200 plaintiffs; a total judgment of approximately 2 1/2 million dollars plus interest was entered against all defendants and subsequently paid through Congressional action.

Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977). Inspector of D.C. Police held personally liable for $500 for disrupting 29 demonstrators at the White House.

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by the threat or reality of suit into inaction. In addition, the present scheme engenders protracted and expensive litigation which costs the taxpayers more money than it should. Because the constitutional tort or Bivens case can depend only on the personal finances of the individual defendants for resolution, it can be settled in the rarest of cases. In addition, multiple defendants are sued in almost seventy-five percent of the cases.

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Schoneberger v. Hinchcliffe, C.A. No. 76-234 (D. Vermont, Sept. 22, 1980). FBI agent personally held liable for $150 for retaining a firearm for too long a period seized during a raid for illegal aliens.

Saxner v. Benson, C.A. No. 75-47-C (S.D. Indiana 1981). Three members of a Federal Corrections Institution Disciplinary Committee held personally liable for $3,000 apiece for violating an inmate's procedural due process rights.

Hobson v. Jerry Wilson, et al., D. D.C. Civil Action No. 76-1326. A total of $711,000 was awarded seven former antiwar activists against fourteen present or retired officers of the FBI or the Washington, D.C. police department. The suit charged violation of constitutional rights during undercover surveillance activities in the 1960s and 70s. The verdict was complex, awarding different amounts for and against different parties.

Epps v. United States, et al., D. Md. CA No. J-78-2373. A judgment of $200,000 was awarded against a Field Branch Chief of the IRS for allegedly vandalizing the property of the plantiff while her business was in the possession of the IRS. The judgment was subsequently vacated on post trial motions.

Nees v. Bishop, et al., D. Col. 524 F.Supp. 1310 (1981). $1,000 was awarded to a plaintiff who alleged that the losing defendant had deprived him of his right to counsel by allegedly advising state custodial authorities that he need not see a state public defender since he had been incarcerated on a federal charge.

Clymer, Jr. v. Grzegorek, et al., E.D. Va., CA No. 80-1009-12 (1982). Damages of $1.00 were awarded against a former federal correctional institution warden in favor of a prisoner who claimed overcrowding and understaffing led to violence and an assault upon him.

Whitney v. Skinner, E.D. Wash. C-78-139 (1982). A judgment of $9,000 was awarded to a Federal employee who alleged that her rights were violated by her supervisor's action that "intimidated her into falling".

Rodgers v. Hyatt, 83-1 U.S.T.C. ¶ 9139 (10th Cir. 1983). The Tenth Circuit Court of Appeals affirmed a jury verdict of $1,000 against an IRS official for disclosure of tax return information notwithstanding the fact that the information had been fully disclosed in a prior court proceeding.

Doran v. Houle, D. Mont. 79-14-GF (1982). A group of veterinarians were awarded $272,000 against a Federal veterinary inspector on the allegation that he wrongfuly denied them licenses necessary for innoculation of sheep. The jury trial lasted ten days and was the subject of extensive media attention. The adverse decision has had a devastating impact on the individual federal defendant and upon the Veterinary Service. It is presently on appeal before the Ninth Circuit.

As a result, conflicts of interest sometimes arise which preclude continued representation by the Department of Justice and require retention of private counsel to represent each of the groups whose factual positions collide. It is anticipated that the cost of hiring private attorneys in those cases will exceed $1,300,000.00 for fiscal years 1982, 1983 and 1984.

Testimony in the House and Senate last year by several United States Attorneys also indicated that a great deal of extra attorney time is required for each matter in order to deal with the personal concerns and trauma of the individual defendants. Those same witnesses also gave eloquent testimony concerning tne very difficult ethical, client relations and resource problems caused by the current state of the law. 6/ I can add to that my personal observation that the decisions that must be made by both clients and Department of Justice attorneys who represent them in these cases are often excruciating. They must be made despite the fact that most of the lawsuits are wholly without merit and may be eventually disposed of on motion. Many of the cases will proceed to resolution at a snail's pace at large monetary and emotional expense to all parties. Thus, from the perspective of any objective observer, the current scheme of civil tort liability, particularly in the area of federal constitutional rights, is a failure.

Were legislation of this nature to be enacted, federal public servants would no longer be subjected to the prospect of personal financial ruin and inordinate disruption from their duties by the need to attend to personal litigation. At the same time, their conduct would just as surely be amenable to the scrutiny of the courts through an action brought against the United States where the reasonableness of the actions of the employee could be challenged. The citizen would have his day in court against a defendant, the United States, which is amenable in every case to personal jurisdiction and service of process, and which is in a

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6/ See, testimony of Stanley S. Harris and Royce C. Lamberth before this Subcommittee on May 19, 1982 and the testimony of Jerome P. O'Neill, John S. Martin, Jr., and William B. Cummings, on November 13, 1981 before the Subcommittee on Agency Administration of the Committee on the Judiciary, United States Senate.

position to settle cases and pay any judgments awarded to the plaintiff. Cases would proceed much more expeditiously to trial and resolution with the cost to all parties drastically reduced.

Opponents to legislation of this nature have historically relied upon an argument best summarized as one of individual accountability. Although the number of adherents to this point of view seems to be declining, the argument is that the threat of suit deters public servants from doing wrong. The short answer to this is that it prevents the public servant from doing anything, including what is right. As one witness before the Senate said last year, "The deterrence we have is that of deterring federal employees from doing their duty." 7/ The increasing number of federal officials who are aware of the state of the law cannot help but face a difficult decision with trepidation because of what should be an extraneous consideration for his or her personal welfare. The welfare case worker, the probation officer, the meat inspector, the contract officer, the veterinarian, the revenue agent, the congressional staffer, the law enforcement officer, the personnel manager, the job foreman, and even the forest ranger are at least given pause and perhaps prevented from carrying out the very mission that Congress has set for them. 8/

In addition, this accountability argument places too much emphasis upon money damages as the only meaningful remedy and ignores the array of other sanctions available which range from agency punishment, including termination, to a finding that the actions were beyond the scope of employment and therefore not defensible by the United States, to injury to professional reputation, to criminal prosecution.

Perhaps the best rebuttal to the deterrence argument,

7/ Testimony of Jerome F. O'Neill, supra.

8/ In an article entitled "Suing Our Servants" appearing in the 1980 edition of The Supreme Court Law Review published by the University of Chicago, (page 281), Peter H. Schuck, Associate Professor of Law, Yale Law School, makes a convincing case for the proposition that the most frequent targets of such suits are the everyday public servants who operate at the level which deals directly with the public. It is important to understand that our support for proposals of this nature is not primarily based upon a desire for relief of high level officials.

however, is the fact that its acceptance means that the American people and government continue to stumble along with the current inadequate system. In other words, in order now to be sure of having the narrow, yet very unlikely, legal possibility of punishing the very few through civil damages, we have placed in jeopardy and confusion the functioning of all civil servants and have not correspondingly provided the plaintiff with a remedy that he or she can expect to be realized. The current "remedy" of deterrence is thus grossly disproportionate to the problem.

The defense of qualified immunity on behalf of the United States with respect to constitutional torts is preserved in in S. 829. I think it important to point out to the Subcommittee that, while labelled as an immunity, it is really an affirmative defense that simply gives the United States the opportunity to defend the conduct of its employees as having been reasonable. The Supreme Court, in the case of Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982), recently defined the test of qualified immunity to be one solely of objective reasonableness. Under traditional tort law analysis, it is the failure to act as a reasonable man in violating a duty owed to an injured person which triggers liability. In the private sector, an employer can assert the reasonableness of the conduct of an employee when the employer is sued for a tort committed by the employee. Retention of the qualified immunity defense would simply echo that legal principle. Elimination of the qualified immunity defense would be a declaration by the Congress that considerations of reasonableness are irrelevant to the conduct of government agents. Taxpayers would pay damages in cases when courts determined with hindsight that technical violations had occurred even though the conduct of the employee was properly motivated and eminently reasonable. I submit that agencies and agents would hesitate to act for fear of damages claims which would reflect adversely upon them because they would be prevented from defending their conduct as reasonable in court. In other words, the government would be placed in a situation of strict liability were the defense to be eliminated, a disadvantage to the United States clearly contrary to existing

provisions of the Federal Tort Claims Act and to reason and sound policy. 9/ I should also add that elimination of the defense would seriously detract from the ability of the courts to consider fully the allegations of misconduct. That is because the issue of the reasonableness of the conduct would have been declared to be irrelevant to liability; and thus many of the pertinent facts would be rendered irrelevant. Accordingly, Mr. Chairman, I urge that the defense continue to be retained.

In closing, Mr. Chairman, I would like to emphasize our support for Title XIII of S. 829. For the first time, plaintiffs would have recourse to a meaningful defendant because the United States would be waiving sovereign immunity for constitutional torts. This is a major reform and benefit that cannot be overstressed. At the same time, the cloud of personal, financial liability would be removed from federal officials who could get on with the business of proper government. Perhaps most importantly, the courts would be enabled to deal with the serious questions that arise in constitutional cases of this nature in an expeditious and meaningful way and award genuine relief to deserving plaintiffs.

I would also again like to congratulate you, Mr. Chairman, on your leadership in this area. I would be pleased to respond to any questions that you or the other members of the Subcommittee might have.

9/ See, letter of April 11, 1983 from Deputy Attorney General Edward C. Schmults to the Honorable Sam Hall concerning the qualified immunity defense.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 11, 1983

Honorable Charles E. Grassley
Chairman
Subcommittee on Administrative
Practice and Procedure
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The following is in response to two questions which you asked me at the hearing on Title XIII of the Comprehensive Crime Control Act, held on May 26, 1983, before the Subcommittee on Administrative Practice and Procedure.

In the first question you asked me for additional examples of cases where the Department has refused to represent a government employee in a "Bivens" action. As I stated at the hearing, upon request we will provide representation in all cases where the behavior in question was within the scope of the individual's employment and representation is in the interest of the United States (28 C.F.R. 50.15).

To illustrate how this principle is applied, we have denied representation in a case involving a wiretap when the individual involved appeared to have clearly exceeded the scope of the warrant which was the basis of the wiretap. We have denied representation in a case where the employee was sued for sexual discrimination and where the employee had been found to have engaged in discriminatory conduct by the EEOC. We have denied representation when the individual defendant was an independent contractor rather than an employee.

In your second question you asked whether any of the cases which had resulted in verdicts were currently on appeal. Based on the list given in footnote 5 of my testimony, the following cases are currently on appeal or have been remanded by appellate courts for further proceedings:

Sequin v Hightower

Halperin v. Kissinger

Saxner v. Benson

Hobson v. Jerry Wilson et al.

Nees v. Bishop et al.

I trust that you will find this information useful.

Sincerely,

J. PAUL McGRATH
Assistant Attorney General

Senator GRASSLEY. It is my pleasure now to call Mr. James Barnes and Mr. Frank Houle. Mr. Barnes is General Counsel for the USDA, and Mr. Houle is a living example of a person that has had some personal experience with the *Bivens* case. We had some live examples in our previous hearings as well, and we know that there incidents are going on and want to keep a file up to date on some of the more outrageous ones.

I would like to have you, Mr. Barnes, introduce the people who are with you.

STATEMENTS OF A. JAMES BARNES, GENERAL COUNSEL; JEFF NESVET, ATTORNEY, GENERAL COUNSEL'S OFFICE, U.S. DEPARTMENT OF AGRICULTURE, ACCOMPANIED BY FRANK H. HOULE, D.V.M., STAFF VETERINARIAN, ANIMAL AND PLANT HEALTH INSPECTION SERVICE; AND LOU GAST, ASSOCIATE ADMINISTRATOR, FOOD SAFETY AND INSPECTION SERVICE

Mr. BARNES. Thank you very much, Mr. Chairman.

On my right is Mr. Jeff Nesvet, who is an attorney in our General Counsel's Office, who specializes in, among other things, tort claims matters. On my immediate left is Dr. Frank Houle, who as you indicated is one of the living examples of a Government official who did what he believed was right, consistent with instructions of his superiors in the job that he was hired to do, and is now on the short end of a $272,000 judgment. On my far left is Mr. Lou Gast, who is the Associate Administrator of our Food Safety and Inspection Service, which has about 10,000 employees who are trying to protect the Nation's food supply and who have great concerns about the state of the law in this area.

I very much appreciate the opportunity to appear before you, Mr. Chairman, and the subcommittee this morning. And again, as Mr. McGrath did, I would prefer simply to submit my statement for the record and just briefly highlight two of the examples involving Department of Agriculture employees that have resulted in judgments against Government employees.

One example involves a Mr. Robert Lehman, a Forest Service district ranger, who was sued by the owner of some property consisting principally of three collapsed bus bodies, a metal box, eight empty barrels and some refrigerators and stoves that had been left unattended on an unpatented Federal mining claim for a period of 6 years. In 1973, Mr. Lehman decided that it was time to clean up this part of the forest that was under his jurisdiction and had the property removed. Two years later, somewhat to his surprise, he found himself a defendant in a lawsuit, claiming that the constitutional rights of the property owner had been violated; that person came forward, said that he owned that property even though his ownership interest was not recorded. He made no claim that Mr. Lehman had been aware of his ownership interest, or even that Mr. Lehman had acted with intent to destroy property that he thought belonged to somebody else.

In that case, the plaintiff was awarded a judgment of $1,000, plus court costs against Mr. Lehman. The plaintiff, I believe, had sought damages in the neighborhood of $50,000. Since that time, the case went to the court of appeals and then up to the Supreme Court. It

was remanded to the court of appeals and is now back in the district court for a new trial. So we find about 10 years after the junk had been destroyed and 8 years after this lawsuit was begun we have an employee who still faces uncertainty as to whether he is going to be personally liable for ordering the property removed from the forest.

The case of Dr. Houle, who is a veterinarian with our Animal and Plant Health Inspection Service, is I think also very illustrative of the kinds of problems in this area. Dr. Houle had been sued individually by three veterinarians whose permits to conduct tests for brucellosis, which is a serious disease of cattle, were not reinstated by Dr. Houle at the direction of his superiors. The State of Montana had originally withdrawn the permits after they received a complaint that these veterinarians were allowing diseased cattle to move in interstate commerce rather than being kept in quarantine as was required. At the direction of his superior, Dr. Houle did not agree to reinstate the test at the point that the State had decided to do so, because his superior had instructed him not to do so until the Federal Government could further investigate the matter.

The veterinarians subsequently did not have their right to conduct these tests reinstated because the State of Montana changed its policy. They subsequently filed suit against Dr. Houle and the State official who had revoked the permits, claiming various violations of their constitutional rights. Their lawyer, in the middle of the jury trial, exhorted the jury that this was the kind of case where you ought to send a message to those Government bureaucrats by imposing substantial damages. The jury then awarded damages against Dr. Houle and the State veterinarian in the amount of $272,000. This case is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit. And while as lawyers for Dr. Houle we are fairly optimistic about our chances in the court of appeals, that judgment hangs over his head at this point.

It is our understanding that he does not have either professional insurance or sufficient assets to pay the judgment should it ultimately be sustained against him. As you noted in your introductory remarks, Mr. Chairman, there are other employees in the Department of Agriculture who on a daily basis are called on to carry out responsibilities relating to inspection and grading of meat, various agricultural products, various other obligations concerning provision of housing, management of land, nutrition, and so on, a long list of activities that are in the public interest. All of these people daily now run the risk that their individual assets may be placed in jeopardy because of some action they have taken, even though they believe at the time to be in the public interest, if it is subsequently determined to have violated somebody's constitutional rights.

We come before you and the subcommittee this morning in the posture of strongly supporting both S. 829 and S. 775 that you would make the United States the defendant in actions where Federal employees acting within the scope of their employment are the subject of allegations that constitutional torts have been committed.

And with that, Mr. Chairman, I would end my statement and would be pleased to respond to any questions, as would Dr. Houle,

who can supply the perspective of somebody who has been involved in one of these suits, and Mr. Gast, who is involved with managing a large group of professionals trying to protect the public health and safety and who feel very concerned, if not threatened, by the course of and the present state of the law.

Senator GRASSLEY. Well, at least I have questions for you, Mr. Barnes, and also to Dr. Houle. Any of the rest of you that want to lend a hand in answering them, that would be appreciated and welcomed.

As I asked the previous witness with the IRS, we are always interested in the internal procedures that a department has to discipline employees who commit torts or other undesired actions, what these are, and the adequacy of them, and hopefully to establish a record that you know that there is a way of punishing employees besides suit.

Mr. BARNES. Mr. Chairman, on that I would simply say that we certainly use both the Inspector General's Office in the Department to look into and develop information concerning misfeasance by officials of the Department, and those findings then are discussed with the supervisors of those individuals, and recommendations and/or actions are pursued.

I think in other cases you are going to find simply the supervisors of individuals, when they have problems like that brought to their attention, taking action. I do not have at my fingertips a comprehensive statement for you in terms of what has happened across the Department or specific examples, but we would be happy to provide it for the record, if it would be helpful to the committee.

Senator GRASSLEY. Yes, I think we would appreciate something like that for the record, because it is a point often brought up by opponents of the legislation.

[Subsequent material supplied appears on page 51.]

Mr. GAST. I might just add to what Mr. Barnes said.

As a manager in an agency where we do have a large number of people who make decisions on a large basis, any misconduct of our employees is looked into at an internal as well as referring to the Office of Inspector General those allegations we would not be able to handle.

I might also say that we have the reputation in our agency of having done what was called a program integrity review. It has been looked at by the General Accounting Office, by other agencies in the Government to try to see whether or not we could determine the kind of situation we put our people in that would cause them to be intimidated in any way, or how we have been able to handle those when they occur.

So we feel we have in our agency a good internal disciplinary program. We have a strict code of conduct and in fact, two laws that we administered are very strong in that regard.

For example, they state that none of us may accept anything of value for any purpose whatsoever. And so for that reason we have a strong code of conduct, and we look into every allegation of this.

Senator GRASSLEY. I think it would be valuable for us to have a little further explanation of the term "looking into," how sophisticated it is, how regularized it is. Could you give us a little more information on that?

Mr. GAST. We would be happy to do that, sir.

[Subsequent material supplied appears on page 51.]

Dr. HOULE. Senator, I can make a point to that. You know most of these people in these programs are innovative and it does not take much thinking to figure out a way to discipline somebody that has got out of line. You can move them to Timbuktu, you can dock their pay—there are all kind of ways to discipline folks. And I personally believe that people that have done things wrong should be disciplined.

I do not think there is any thinking Government employee that thinks to the contrary.

Senator GRASSLEY. Before I go to Dr. Houle, how many *Bivens*-type suits are pending against USDA employees? And how many individual cases? And then, what is the total number of employees that are dependents?

Mr. BARNES. Mr. Chairman, I am not sure that I have a precise count. One of the difficulties in trying to give you a count is that we find increasingly in lawsuits that are challenging agency action on regulations or regulatory decisions that the lawyers are, as a matter of course, throwing in counts or claims against departmental officials in their individual capacity.

Mr. NESVET. While we do not keep comprehensive statistics, we see a range of lawsuits. Some of them are clearly motivated by personal animus and attempt to seek damages from the personal assets of the employee. Others I think are motivated by unfamiliarity of counsel in suing the Federal Government, by excess caution or as a negotiating or bargaining tactic in relations to other counts in the litigation.

So it is hard to really say how many suits are brought which really intend to seek damages against employees of our Department. I think what is fair to say is that we have hundreds of suits that have been filed that to one extent or another name Department employees as defendants, and that this trend is continuing and increasing.

Senator GRASSLEY. To the extent which you might have more concrete statistics, without a great deal of effort, submit those to us.

Mr. BARNES. We would be happy to do so, Senator.

[Subsequent material supplied appears on page 51.]

Senator GRASSLEY. Dr. Houle, how long have you been an employee of the USDA?

Dr. HOULE. Twenty years, sir.

Senator GRASSLEY. Are you still making decisions that affect the plaintiffs?

Dr. HOULE. The plaintiffs involved that are suing me?

Senator GRASSLEY. Yes.

Dr. HOULE. In some cases I am, yes, sir. They submit health certificates for endorsement and I sometimes in my position have to endorse those certificates.

Senator GRASSLEY. Would you say that this lawsuit against you causes you to think about almost any decision you make as to whether or not the decision might generate a legal action against you?

Dr. HOULE. Absolutely.

Senator GRASSLEY. What effect, if any, has this suit had on your family?

Dr. HOULE. Very seriously. My mother is 75 years old and is on heart medication, and it so happens that she lives in the town where this trial took place. And the associated adverse publicity has been very difficult on her. She does not understand the circumstances, and she has lived there as a respected member of the community for 40 years, and she really does not like this. It has been very tough.

The rest of my family, you know, they have been very good about it.

Senator GRASSLEY. How about the impact upon your coworkers?

Dr. HOULE. It hurt them pretty bad. I had calls from all over the United States from the people that I have known and worked with and gone to various schoolings with over the past 20 years, and they are all in support of me. And these people tell me that they are afraid to make decisions because of possible adverse affects. The tendency is going to be, Mr. Grassley, if this does not stop, that people are going to refer all their decisions upstairs to higher sources and you are going to have a Government that is not responsive to the people—that is, in my opinion. They are going to defer and pass the buck because they are afraid of personal liability.

I cannot make this blanket statement, but I have had this related to me from several sources.

Senator GRASSLEY. Now in the 20 years that you have been employed, or I should say at least 20 years involved, have you heard of these types of suits, or ever been threatened with liability?

Dr. HOULE. Yes, sir. I have been threatened since this case was brought to trial with another suit, directly involved. Not directly involved with the individuals, but because the second group of individuals read about the suit, they personally threatened to sue me in front of a group of livestock producers that I had been asked to address, over a situation of some brucellosis infected cattle. They have gone as far as to have a lawyer send us a letter on a fishing expedition, if you will. As of yet no charges have been filed, but they told me that charges and the moneys that you were found liable for in the first case is chicken feed, I am talking about millions. That is a direct quote from this individual.

Senator GRASSLEY. Did you have to be sued the first time before the possibility of the suit started entering into your thought process in affecting your decisions and making you more cautious?

I do not want to put words into your mouth. But even leaving you to do less than what might be required of you?

Dr. HOULE. Well, personally, I have always tried to be careful, and I have always considered that if I was doing what I was told to do, acted within the scope of my employment, in good faith, that I would be protected. But that is not the way it comes out in the end.

I am more careful now, Mr. Grassley, than I was before, but I never was careless. I always had it in the back of my mind that, you know, there is liability. But I had no dream that it was this great, believe me.

Senator GRASSLEY. Could you give me some details of the case?

Dr. HOULE. Yes, sir. I was appointed acting Federal veterinarian in charge of Montana between a change in chiefs, from February 6 to July 7, 1978. During that time I was asked by the State veterinarian to sign off on a card test permit for three veterinarians who practiced in a group in Great Falls, Mont. Now I had nothing to do with the removing of the permits in question. The State veterinarian had removed them for various reasons, mainly allegations that the individuals were abusing the privilege.

The board of livestock in our State of Montana instructed, after a hearing, which I had no part in, our State veterinarian to reinstate these card test privileges. He signed off on the permit and presented it to me. I did not sign the permit until I sought the counsel of my superior, and in this case I made a phone call to Dr. Morgan, who was then the acting regional director. Dr. Morgan instructed me not to sign the permits, which I did not. The rest of it is history. The individuals brought suit.

Senator GRASSLEY. Did you hire a private attorney, or were you represented by the Government? Did you request counsel?

Dr. HOULE. Yes, sir. I requested counsel and I am represented by the Government. However, I have incurred personal legal expenses because first of all I took the charges to my personal attorney to find out what he thought; and second, I was advised to do what I could to protect my assets since they tried to seize them twice. I have accrued legal expenses changing wills for the small assets that I do have to try to protect them, to buy some time, if you will.

Senator GRASSLEY. Your case is on appeal. Has there been a date set yet?

Dr. HOULE. Yes, sir. I think the oral arguments are to occur June 8, at 9 o'clock in Seattle, Ninth Circuit Court of Appeals is to hear it.

Senator GRASSLEY. I might also suggest to you that Senator Baucus, who could not be here this morning, is a member of the subcommittee, and it may be that you would want to stop by and visit with him. I am sorry he could not be here today to visit.

I assume you are living in Montana, right?

Dr. HOULE. Yes, sir.

Senator GRASSLEY. While you have been sued, and through this period of appeal you have still been on the job doing your work?

Dr. HOULE. Yes, sir.

Senator GRASSLEY. As you have had to do. But I suppose everything that you have touched, I mean everything you have done in a sense, you have been forced into a position of being overly cautious. Right?

Dr. HOULE. Yes, sir. I am more cautious than I was, believe me.

Senator GRASSLEY. Well, I have no further questions, but I surely want to thank you, Dr. Houle, for coming here, being an example of what this legislation is all about. It is the governmental environment that exist today that we are trying to correct. We surely do not want to give any employee a license to do anything he wants to do, but obviously we want him to pursue the goals of his job. We want persons to be cognizant of doing their job. But in the pursuit of that job, it seems to me, like you should not have to worry about whether or not your own personal livelihood, existence, and family relationships will be upset just because you are doing what the

instructions call for. We are trying to solve that problem. I hope we can.

I have had a lot of Government employees like you come before our subcommittee to relieve the situation that you find yourself in. I hope we can do it.

Thank you all very much.

Mr. BARNES. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Barnes and additional material supplied in response to requests of Senator Grassley follow:]

Prepared Statement of A. James Barnes

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to be able to provide this statement in support of amending the Federal Tort Claims Act by providing that the United States shall be the exclusive defendant in all torts involving actions of Government employees taken within the scope of their employment. The proposed legislation, Title XIII of the bill S. 829, which is proposed by the Administration, and S. 775, sponsored by the Chairman, Senator Grassley, would, among other things, free Federal employees of liability for damages arising from constitutional torts committed in the line of duty, and make the United States liable for such damages. This Department has consistently supported the concept of immunizing Government employees from personal liability for damages arising out of actions taken within the scope of their employment. Therefore, we strongly support adoption of legislation to accomplish this purpose.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), the Supreme Court allowed private parties to recover damages against individual Government employees alleged to have violated their constitutional rights and in Butz v. Economou, 438 U.S. 478 (1978), the Court substantially diminished the scope of judicially created immunity. Consequently, in recent times Government employees who deal with or take actions affecting the public run a substantial risk of being sued personally for alleged violations of constitutional rights. While the number of money judgments obtained as a result of constitutional tort actions have been few, numerous employees of this and other agencies have been subjected to the anxiety and burden of litigation seeking to hold them personally liable for action taken while acting as Government employees.

We believe the vast majority of employees of this Department try not to let the risk of personal liability affect

their judgment as to the proper execution of their duties. It is unrealistic, however, to conclude that in no instance has the threat of personal liability significantly restrained good faith action in the public interest. As the number of suits alleging constitutional torts continues to increase and employees become more aware of the burden imposed upon them by their potentially being named a defendant in a constitutional tort action, the risk of substantial harm to the decisionmaking processes of the Government increases.

The present state of the law disserves the victims of violations of constitutional rights. It would often be difficult to collect a substantial judgment against an individual Government employee. Furthermore, because of the fact that any settlement must be paid by the individual Government employee, the possibility of settling these actions is severely limited. Therefore, in many cases the Government must spend tens if not hundreds of thousands of dollars in salary costs or payment to outside attorneys to litigate cases that could be settled for a fraction of the costs of litigation.

This Department has been particularly concerned about the present state of the law because we have a large number of employees who deal with the public or make decisions affecting the public, thus subjecting them to potential personal liability. Two of the few judgments handed down against Government employees in constitutional tort actions came in suits against Robert C. Lehman, an employee of the Forest Service, and Dr. Frank H. Houle, an employee of the Animal and Plant Health Inspection Service. Mr. Lehman, a Forest Service District Ranger was sued individually by the owner of certain property -- consisting principally of three collapsed bus bodies, a metal box, eight empty barrels and some refrigerators and stoves -- which had been left unattended on an unpatented federal mining claim on federal land for six years. In May of 1973, Mr. Lehman had the material disposed of by Forest Service

employees under his direction as part of an effort to clean up the area. Two years later, Mr. E. B. Weiss filed suit alleging an ownership interest in the property and claiming that its destruction was a violation of his Fifth Amendment due process rights. He claimed that one of the mine claimants had traded the property to him in return for a lease on a dredge at another mine site. His ownership interest was not recorded and he made no claim that Mr. Lehman was aware of his ownership interest or even that he acted with the intent to destroy property he thought belonged to another person.

After trial before a jury in June, 1978, Mr. Weiss was awarded the sum of $1,000 plus court costs. The decision was appealed to the U.S. Court of Appeals for the Ninth Circuit, where it was upheld and then to the Supreme Court which remanded it back to the Court of Appeals in light of its decision in Parratt v. Taylor, 451 U.S. 527 (1981), a case it had recently decided involving deprivation of property without due process. The Court of Appeals then remanded it back to the District Court for a new trial, which is currently pending, on the question of the practicality of giving predeprivation notice to the plaintiff. Thus, almost ten years after the destruction of the three bus bodies and almost eight years after the service of the initial summons and complaint, Mr. Lehman still faces uncertainty with respect to his possible liability for judgment.

Dr. Houle, a veterinarian with the Animal and Plant Health Inspection Service was sued individually by three individuals in business together as veterinarians whose permits to conduct tests for brucellosis, a serious disease of cattle, were not reinstated by Dr. Houle at the direction of his superiors. The permits are issued on a cooperative basis by APHIS and state agencies in accordance with APHIS regulations. The State of Montana initially withdrew the permits after receiving a complaint from a USDA epidemiologist that several cows shown to be infected with brucellosis in tests conducted by the plaintiffs were placed

in commerce rather than being kept in quarantine pens as required.

After an administrative hearing conducted by the state, the reinstatement forms were signed by the relevant state official and forwarded to Dr. Houle whose signature was also required for the reinstatement to be effective. At the direction of his superiors, Dr. Houle did not sign the form pending further investigation. Neither plaintiffs nor their counsel at any time filed a request with Dr. Houle for a hearing on their permits. Shortly after the completion of the federal investigation, Montana changed its policy to provide that brucellosis test permits would only be issued to veterinarians who were appointed as livestock market veterinarians. Plaintiffs were not so appointed and thus did not qualify to receive permits. Plaintiffs were subsequently so informed by another APHIS official.

Plaintiffs filed suit against Dr. Houle and the state official who initially revoked plaintiffs' permits. They alleged various violations of their constitutional rights. After a jury trial featuring fervent exhortations by plaintiffs' counsel to use this case to send a message to other bureaucrats by imposing substantial damages, the jury awarded plaintiffs the sum of $272,000. The case is currently on appeal to the U.S. Court of Appeals, for the Ninth Circuit. While we are optimistic regarding the prospects in the Court of Appeals, it is our understanding that Dr. Houle has no professional insurance and therefore cannot pay the judgment should it be sustained.

In addition to the numerous employees of the Forest Service and the Animal and Plant Health Inspection Service, other Department employees daily run the risk that members of the public aggrieved by their decisions will sue them personally, as they engage in inspection and grading of meat, poultry, grain, fruit, vegetables, and other agricultural crops, provide technical advice and assistance concerning farming, raising

livestock, construction and repair of housing, management of land and nutrition, and regulate the production and handling of numerous food products. All of these employees, who are working to assure the continued availability of an adequate, nutritious, and safe food supply, are subject to the burden of being sued individually every time they make any decision affecting an outside party. Thus, we believe that legislation providing immunity from personal liability is desirable to protect the integrity of Government decisionmaking. We believe the legislation before the Subcommittee strikes a fair balance by immunizing individual employees while giving individuals whose constitutional rights may have been violated a cause of action against the United States.

We would like to take this opportunity to endorse the provision in S. 829 to amend the Federal Tort Claims Act to increase the authority of Government agencies to settle claims administratively in common law tort cases without the necessity of seeking approval from the Department of Justice. We believe the policy considerations that led Congress to grant agencies this authority still apply, and that revising the figure from $25,000 to $50,000 simply adjusts the appropriate level to reflect the effects of inflation.

In summary, we strongly support legislation amending the Federal Tort Claims Act to substitute the United States as the exclusive defendant in all tort suits involving actions of Government employees within the scope of their employment. We believe that enactment of such legislation would result in both Government employees and potential claimants being treated far more justly than current law provides.

Accompanying me today is Dr. Frank H. Houle, an Animal and Plant Health Inspection Service veterinarian from Montana against whom one of the few constitutional tort judgments has been handed down. We will be happy to answer any questions you may have.

U.S. DEPARTMENT OF AGRICULTURE,
OFFICE OF GENERAL COUNSEL,
Washington, D.C., June 10, 1983.

Hon. CHARLES E. GRASSLEY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We are pleased to respond to the questions you raised at the recent hearing on title XIII of S. 829, which would make the United States the exclusive defendant in all tort suits arising out of actions taken within the scope of a federal employee's employment.

A review of our records discloses that approximately 185 suits are now pending in which employees of this Department have been named as defendants by plaintiffs, seeking damages as a result of actions taken within the scope of their employment. Each of these suits names anywhere from one to as many as ten individual employees or former employees.

Enclosed with this letter is a paper prepared by the Food Safety and Inspection Service which discusses the procedures that organization utilizes to ensure that its employees do not violate the rights of citizens with whom they deal during the course of their employment. This Department is composed of over two dozen agencies and staff offices. While the exact procedures may vary somewhat among these organizations because of differences in their size and organizational structure, we believe that the procedures outlined in this paper are typical of the efforts that this Department makes to protect the rights of individuals with whom our employees deal each day.

Sincerely,

A. JAMES BARNES,
General Counsel.

Enclosure.

The Food Safety and Inspection Service (FSIS) has procedures in place for 3 types of misconduct concerning regulated plants. One procedure concerns prohibited discrimination. Another deals with misconduct by non-USDA employees licensed by FSIS. The third and most common concerns allegations of misconduct by FSIS employees.

Prohibited discrimination

Non-USDA employees who allege discrimination by FSIS employees may lodge a complaint with the USDA, Office of Minority Affairs. An inquiry is conducted by that office. If warranted, the Office of Inspector General will conduct an investigation. If the inquiry or investigation discloses discrimination by an FSIS employee, appropriate disciplinary action will be taken by FSIS. Where the misconduct is a criminal matter, the matter is referred to the appropriate U.S. Attorney for a prosecution determination.

Licensed non-employees

When FSIS receives an allegation of misconduct related to inspection concerning a person licensed by FSIS, but not an FSIS employee, an inquiry is conducted. If abuse has occurred, FSIS may withdraw the license. The option also is open to refer the matter to the U.S. Attorney for prosection.

Misconduct by FSIS employees

When an allegation of misconduct by an FSIS employee toward a regulated plant is made, our first step is to conduct an informal inquiry at the field level. Most complaints are resolved at this level because they grow from the normal interaction between FSIS employees and the regulated industry. In those cases where the complaint does not grow from the normal interaction and where abuse is suspected, the matter is referred to the Office of Inspector General for investigation. If criminal misconduct has occurred, the appropriate U.S. Attorney will make a prosecution determination. Regardless of that determination, FSIS will make a separate administrative determination as to whether or not discipline is warranted. If the U.S. Attorney chooses not to prosecute, FSIS may still elect to reassign or discipline an employee who abuses his position.

Senator GRASSLEY. Our next witnesses, Mr. Thomas Madden, and Mr. Nicholas Allard. They are with the law firm of Kaye, Scholer, Fierman, Hays & Handler. They are primarily responsible for a study they prepared for the Administrative Conference for discus-

sion of this subject; the discussion of executive branch official liability and immunity at the Federal, State, and local levels of government.

I want to thank you, gentlemen, for your participation in this hearing, and know that your scholarly approach will be beneficial to this subcommittee as we consider the legislation before it.

Proceed.

STATEMENT OF THOMAS J. MADDEN, ATTORNEY, ACCOMPANIED BY NICHOLAS W. ALLARD, ATTORNEY, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Mr. MADDEN. Thank you very much, Senator Grassley, for inviting us to testify today.

I have a statement which I submitted for the record, and I would ask that it be inserted in the record as read. I would like to read briefly from it with some additions as I go along.

Senator GRASSLEY. Yes, please do. And it will be printed in the record in total.

Mr. MADDEN. Mr. Chairman, my interest in this matter is not academic. Before joining my current law firm I served for 8 years in the Department of Justice as General Counsel for the Law Enforcement Assistance Administration, and there I had the opportunity to observe firsthand the problems that have plagued plaintiffs and defendants alike in *Bivens*-type actions. I was involved in one case which is still pending, in which the head of our agency and the Attorney General and two other Government officials were sued for damages in their personal capacity, in the amount of $20 million.

I would echo the point you made at the conclusion of the last witness' testimony, and I would hope very much that this Congress would pass legislation that would relieve the burden of potential liability from Government employees while at the same time deterring employees from committing acts that are clearly in violation of the law. I have given this matter close study, preparing the report which you and Chairman Smith referred to. The report on sovereign immunity and official liability has been made available to the committee. My associate, Nick Allard, and I prepared that report, and Nick and I and another associate also prepared an article on these legislative matters which will be coming out shortly in the Harvard Journal on Legislation, which we have made available to the committee.

I would like to be brief on my points. I think in the 10 years since Congress has labored on these issues, and in particular the work that your committee has done in its extensive hearings, many of these points have been extensively addressed and discussed, and I think we all agree by this time that the *Bivens* remedy is not satisfactorily serving the purpose it was fashioned by the Supreme Court to promote; that is, assuring adequate compensation of the victim, measured deterrence of official wrongdoing, and fairness in the administration of justice. It is widely recognized that limiting those who have suffered constitutional injuries to suits against individual Federal employees does not afford victims of official misconduct a financially responsible defendant.

It is also widely perceived that the very risk of being sued in a *Bivens*-type action discourages Federal employees from vigorously discharging their official responsibilities. Largely for these reasons, most people agree that the purpose of the *Bivens* remedy would be better served if the United States were substituted as the defendant in constitutional tort suits arising out of the allegedly unconstitutional conduct of Federal employees. As you are well aware, efforts to replace the *Bivens* remedy raise a host of subsidiary issues, and it is around these issues that the most disagreement persists, particularly the issue relating to the good faith defense.

THE GOOD-FAITH DEFENSE

The Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee last week voted to amend H.R. 595 to preclude the United States from asserting qualified immunity or the good faith defense in constitutional tort suits. I would like to devote the remainder of my testimony to explaining why I believe that this subcommittee should similarly amend title XIII of S. 829, and also to followup on the Judge Williams quote that Loren Smith referred to.

It is often the case that an official cannot possibly know what the law is from a constitutional law standpoint. It is up to the Supreme Court to decide what that law finally is, but as between the victim who suffers a real harm and the government, the question is whether the government, which caused that injury to occur, should bear the loss or whether the individual should bear the loss.

As Congressman Sam Hall observed in the debate on the House bill, the qualified or good-faith immunity is a powerful defense tool in constitutional tort litigation. However, that alone is not a sufficient reason to authorize the United States to assert that immunity in constitutional tort suits. To the contrary, there are a number of powerful considerations, I believe, that mitigate against authorizing the United States to assert that immunity.

First, nothing in the policy underlying the defense of qualified immunity justifies making it available to the United States in constitutional tort suits. Vicarious immunity is not the flip side of vicarious liability. The policy justification for affording Federal employees qualified immunity disappears when the Federal Government is made liable instead of the employee.

As the Supreme Court recognized in its decision in *Owens* v. *The City of Independence* and as Judge Posner noted in a section 1983 case he handed down last month, in which the seventh circuit held that a municipality may not assert the absolute immunity of its employees in 1983 suits, "holding the [Government] liable creates incentives to avoid illegal behavior without at the same time overdeterring individuals by the threat of crushing personal liability."

The second point on good faith is that nothing in established tort doctrine applicable in any analogous situation of vicarious liability supports the proposition that the United States should be allowed to assert the qualified immunity of its employees in constitutional tort suits. In nonconstitutional tort suits under the Federal Tort Claims Act, Federal courts are virtually unanimous in holding that the United States may not assert an employee's immunity. Similar-

ly, the general rule is that State and local governments sued for the misconduct of an employee may not assert the employee's personal immunity. To authorize the United States to assert qualified immunity in constitutional tort suits would thus be to confer upon the United States an advantage enjoyed neither by State and local governments in analogous situations, nor by the United States itself in nonconstitutional tort cases.

My third point on good faith is that allowing the United States to assert the qualified immunity of its employees would cancel out two of the main benefits, I believe, that are supposed to follow from replacing the *Bivens* remedy with a statutory action against the United States and not against the individual employee.

First, Federal employees would unavoidably remain enmeshed in protracted litigation over the reasonableness of their conduct. This seems unfair to the Federal employees in at least two respects. As currently drafted, title XIII would place the employee's good faith in issue while depriving him of control over the very litigation in which that issue is to be tried. It would seem to me to be inequitable to force Federal employees to depend for the vindication of their reputations on the litigation tactics and strategies of the Government in a constitutional tort suit. If liability did not turn on whether the employee acted in good faith, then no adverse inference could be drawn from a determination of liability, or from a settlement of a plaintiff's claim.

Moreover, even when the Government elects to mount a vigorous defense of the employee's good faith, which it does in these cases, the result would be to embroil the employee in drawn out discovery and trial, one of the burdens of substituting the United States as defendant in large measure is meant to avoid. Second, allowing the United States to invoke qualified immunity will discourage many plaintiffs with meritorious claims from suing the United States and will foreclose redress to many who have suffered constitutional injuries. When a constitutional right has been violated, the burden should be borne by the public as a cost of government.

For these reasons, Mr. Chairman, I believe that this subcommittee should amend title XIII of S. 829 as the House Subcommittee on Administrative Law and Government Relations amended H.R. 595 last week. That is to preclude the United States from asserting a qualified or good-faith defense currently available to its employees in *Bivens*-type actions. There is concern that precluding the United States from asserting qualified immunity or the good faith defense might subject the United States to unwarranted damage judgments in constitutional tort suits. Again, Assistant Attorney General McGrath testified as to that concern. I think the amendments to H.R. 595 deal with those concerns in two respects.

First, title XIII could be amended to expressly affirm a trial court's power to dismiss insubstantial or frivolous constitutional claims. Second, title XIII could be amended to provide only nominal damages of $1 in truly de minimis cases or perhaps where the law has worked a fundamental, or as Judge Skelley Wright put it, an avulsive change in the law, or even under other extraordinary circumstances where justice so requires a minimal award of damages.

H.R. 595 was amended to provide for the nominal damages and Congressman Kindness has expressed interest in the language we suggested with respect to the district court's power to dismiss non-serious claims.

Mr. Chairman, I want to again thank you for inviting me to testify on the legislation. I will be glad to provide you with any assistance that you might request.

That concludes my oral testimony.

Senator GRASSLEY. Did you have anything that you wanted to add?

Mr. ALLARD. It would be hard to add anything to Tom's remarks.

Senator GRASSLEY. I did not want to pass you up if you had some formal statement that you want to make before I ask questions.

Now, as you just finished, Mr. Madden, is this in a sense the middle ground in that you seek minimal damages?

Mr. MADDEN. I think it is a minimal ground. What I am proposing, one, is that the United States be substituted as a defendant, as your bill proposes, so that the Government employees would no longer be personally liable.

Two, that the good-faith defense not be allowed to the Government, because it is not a defense that the Government traditionally has had. But to avoid the cost problem that the Assistant Attorney General referred to, the compromise would allow award of actual damages against the United States without a good-faith defense. Or in situations where actual damages could not be proved there would be a range of damages provided in the form of liquidated damages ranging down to a dollar for nominal-law damages up to amounts of liquidated damages as suggested in your legislation.

Senator GRASSLEY. Do you have any ideas that you would like to put forth on the question of jury trial or attorneys fees?

Mr. MADDEN. I am really not prepared to testify on the attorneys fees. I know other people have testified on the attorneys fees. I personally think attorneys fees are very important in these types of cases, but I think that that is an issue that should be considered in a broader context. I really wanted to focus on the good-faith defense.

The same issue arises with respect to jury trial. I think that a person has good-policy reasons for that. But the concern that I really wanted to go to today was the good-faith issue.

Senator GRASSLEY. I have no further questions. Thank you for your testimony.

[The prepared statement and submissions of Mr. Madden follow:]

Prepared Statement of Thomas J. Madden

Good morning, Mr. Chairman, and members of the Subcommittee. My name is Thomas J. Madden. I am a partner in the law firm of Kaye, Scholer, Fierman, Hays & Handler. Accompanying me is Nicholas W. Allard, also of that firm.

Mr. Chairman, let me begin by thanking the Subcommittee for inviting me to testify this morning on the important legislation before you, Title 13 of S. 829. My interest in the matter is not academic. Before joining Kaye, Scholer, I served for eight years in the Department of Justice as General Counsel of the Law Enforcement Assistance Administration. There, I had the opportunity to observe at first hand the problems that have plagued plaintiffs and defendants alike in Bivens-type actions. I have also given the matter close study in preparing an extensive report on sovereign immunity and official liability for the Administrative Conference of the United States, which we completed last fall. I have made a copy of that report available to Subcommittee Staff. Finally, with Nicholas W. Allard and David H. Remes I have written an article addressing the Senate bills on this issue, and their companion House bill, for the Harvard Journal on Legislation.*

Mr. Chairman, I will be very brief, for in the ten years since the Nixon Administration introduced the first legislation to substitute the United States as defendant in constitutional tort suits, the issues involved have been exhaustively addressed. I think we are all agreed by this time that the Bivens remedy is not satisfactorily serving the purposes it was fashioned by the Supreme Court over a decade ago to promote: assuring adequate compensation of the victim, measured deter-

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* Madden, Allard, and Remes, Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits, 20 Harv. J. on Legis. 469 (1983).

rence of official wrongdoing, and fairness in the administration of justice. It is widely recognized that remitting those who have suffered constitutional injuries to suits against individual federal employees does not afford victims of official misconduct a financially responsible defendant. It is also widely perceived that the very risk of being sued in a Bivens-type action discourages federal employees from vigorously discharging their official responsibilities. Largely for these reasons, most people agree that the broad purposes of the Bivens remedy would better be served if the United States were substituted as defendant in constitutional tort suits arising out of the allegedly unconstitutional conduct of federal employees.

As members of this Subcommittee are well aware, however, efforts to replace the Bivens remedy with a statutory action against the United States raise a host of subsidiary issues, and around these issues much disagreement persists. Disagreement is sharpest over the issue of whether the United States should be permitted to assert the qualified immunity or "good faith" defense currently available to its employees in Bivens-type actions. The Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee last week voted to amend H.R. 595 to preclude the United States from asserting qualified immunity or the "good faith" defense in constitutional tort suits, and I would like to devote the remainder of my testimony to explaining why I believe that this Subcommittee should similarly amend Title 13 of S. 829.

As Congressman Hall has observed, the qualified or "good faith" immunity is a powerful defense tool in constitutional tort litigation. As the Subcommittee on Administrative Law and Governmental Relations was ultimately persuaded, however, that alone is not a sufficient reason to authorize the United States to assert that immunity in constitutional tort suits. To the contrary, at least four powerful considerations

militate against authorizing the United States to assert the immunity.

First, nothing in the policy underlying the defense of qualified immunity justifies making it available to the United States in constitutional tort suits. Vicarious immunity is not the flip-side of vicarious liability. The policy justification for affording federal employees qualified immunity disappears when the federal government is made liable instead, as the Supreme Court itself emphasized in the § 1983 context in Owen v. City of Independence. As Judge Posner noted in a § 1983 decision handed down last month -- in which the Seventh Circuit held that a municipality may not assert the absolute immunity of its employees in § 1983 suits -- "holding the [government] liable creates incentives to avoid illegal behavior without at the same time overdeterring individuals by the threat of crushing personal liability."*

Second, nothing in established tort doctrine applicable in any analogous situation of vicarious liability supports the proposition that the United States should be allowed to assert the qualified immunity of its employees in constitutional tort suits. In non-constitutional tort suits under the Federal Tort Claims Act, federal courts are virtually unanimous in holding that the United States may not assert an employee's immunities. Similarly, the general rule is that State and local governments sued for the misconduct of an employee may not assert the employee's immunities. To authorize the United States to assert qualified immunity in constitutional tort suits would thus be to confer upon the United States an advantage enjoyed neither by State and local governments in analogous circumstances, nor by the United States itself in non-constitutional tort suits.

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* Reed v. Village of Shorewood, 704 F.2d 943, 953 (1983) (emphasis added).

Third, allowing the United States to assert the qualified immunity of its employees would, paradoxically, cancel out two of the main benefits that are supposed to follow from replacing the Bivens remedy with a statutory action against the United States.

1. Federal employees would unavoidably remain enmeshed in protracted litigation over the "reasonableness" of their conduct. This seems unfair to the federal employee in at least two respects. As currently drafted, Title 13 would place the employee's good faith in issue while depriving him of control over the very litigation in which that issue is to be tried. It would seem inequitable indeed to force federal employees to depend for the vindication of their reputations on the litigation tactics and strategies of the government in a constitutional tort suit. If liability did not turn on whether the employee acted in good faith, then no adverse inference could be drawn from a determination of liability, or from a settlement of a plaintiff's claim. Moreover, even when the government elects to mount a vigorous defense of the employee's good faith, the result would be to embroil the employee in drawn-out discovery and trial -- one of the burdens that substituting the United States as defendant is in large measure meant to avoid.

2. Allowing the United States to invoke qualified immunity will discourage many plaintiffs with meritorious claims from suing the United States, and will foreclose redress to many who have suffered serious constitutional injury. When a constitutional right has been violated, the burden should be borne by the public as a cost of government. Since the compelling policy considerations that justify affording federal employees qualified immunity do not apply where the United States is the defendant, there

is no justification for denying compensation to victims of official misconduct.

Fourth, and finally, allowing the United States to assert the "reasonableness" of an employee's conduct as a defense in constitutional tort suits would have the unfortunate effect of reducing constitutional injuries to the status of negligent torts. An employer, in the negligence context, is allowed to assert the reasonableness of an employee's conduct for one very simple reason: if the employee has acted reasonably, there is no negligence, and hence no tort has occurred. If, on the other hand, a federal employee violates someone's constitutional rights, a legally cognizable wrong has occurred, and the "reasonableness" of the federal employee's conduct is immaterial. The Constitution itself defines what is "reasonable," and any departure from that standard is, by definition, unreasonable.

For these reasons, Mr. Chairman, I believe that this Subcommittee should amend Title 13 of S. 829, as the House Subcommittee on Administrative Law and Government Relations amended H.R. 595 last week, to preclude the United States from asserting the qualified immunity or the "good faith" defense currently available to its employees in Bivens-type actions. If there is a concern that precluding the United States from asserting qualified immunity or the "good faith" defense might subject the United States to unwarranted damage judgments in constitutional tort suits, then we would propose amending Title 13 in two further respects. First, Title 13 could be amended to expressly affirm a trial court's power to dismiss insubstantial or frivolous constitutional claims. Second, Title 13 could be amended to provide for only nominal damages of $1.00 in truly de minimis cases, or, perhaps, where the law has worked a fundamental or, as Judge Skelley Wright put it, an "avulsive" change in the

law,* or under other extraordinary circumstances where justice so requires. H.R. 595 was amended to provide for the nominal damages we suggested, and Congressman Kindness has expressed interest in the language we suggested with respect to the district court's power to dismiss non-serious claims.

Again, Mr. Chairman, I thank you and the other members of the Subcommittee for inviting my views on this important legislation. I will, of course, be glad to provide any assistance that may be desired on refining the language of Title 13.

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* Zweibon v. Mitchell, 606 F.2d 1172, 1183 (D.C. Cir. 1979), cert. denied, 101 S. Ct. 3147 (1981). See, e.g., Monnell v. Department of Social Services, 436 U.S. 658 (1978) (overruling Monroe v. Pape with respect to municipal liability under § 1983); Katz v. United States, 389 U.S. 347 (1967) (overruling Olmstead v. United States with respect to physical trespass theory of Fourth Amendment protections).

[From Harvard Journal on Legislation, Vol. 20:469]

BEDTIME FOR *BIVENS*: SUBSTITUTING THE UNITED STATES AS DEFENDANT IN CONSTITUTIONAL TORT SUITS

THOMAS J. MADDEN*
NICHOLAS W. ALLARD**
DAVID H. REMES***

During the past decade, Congress has struggled with the problem of sovereign immunity for constitutional torts committed by employees of the federal government. The Ninety-eighth Congress has proved to be no exception. Three bills, H.R. 595, S. 775, and S. 829, have been introduced during the current Congress to modify the immunity available to the federal government in the event of constitutional torts committed by its officials. For the most part, the current system has remained unchanged since the Supreme Court ruled in Bivens v. Six Unknown Named Agents *that victims of constitutional violations by federal officials may recover damages against wrongdoing officials under the Constitution.*

The authors, critical of the Bivens *remedy, find that those bills currently before Congress that attempt to rectify* Bivens *do not adequately reconcile the seemingly incompatible goals of providing adequate compensation for the tort victim and of ensuring the accountability of the wrongdoing official. According to the authors, it is not enough for the legislation to provide only for the substitution of the United States as the exclusive defendant in actions against its wrongdoing officials. The legislation should preclude the United States from asserting the qualified immunity available to the wrongdoing official, and should establish an alternative system of administrative sanctions against the individual official.*

For over ten years, Congress has considered, but failed to adopt, amendments to the Federal Tort Claims Act (FTCA)[1]

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The authors acknowledge the indispensable efforts and talents of Thaddeus J. Plante.

This Article follows an extensive study by the authors on the subject of executive-branch official liability and immunity at the federal, state, and local levels of government prepared for the Administrative Conference of the United States. T. MADDEN & N. ALLARD, ADVICE ON OFFICIAL LIABILITY AND IMMUNITY (1983); *see* Federal Officials' Liability for Constitutional Violations, 47 Fed. Reg. 58,207 (1982) (to be codified at 1 C.F.R. § 305.82-6). The analyses, comments, and views expressed in this Article are those of the authors and do not necessarily represent the policies, positions, or recommendations of the Administrative Conference.

[1] 28 U.S.C. §§ 1346(b), 2671–2680 (1976 & Supp. V 1981). The FTCA provides that the United States generally will be liable for its torts in the same manner as a private

that would provide a damage remedy against the United States for constitutional injuries caused by federal officials.[2] These proposed amendments would have provided for the substitution of the federal government as the defendant in suits that can now be brought against only individual officials. The *Harvard Journal on Legislation*'s last look at this legislative activity was a 1979 article by Attorney General Griffin Bell.[3] Now, with the Ninety-eighth Congress in session, the long-running controversy over liabilities and immunities for constitutional torts caused by federal officials is again on the national agenda.

This Article analyzes the issues that Congress faces as it considers whether to authorize a new waiver of sovereign im-

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individual at common law. The United States may be held liable for such torts only to the extent that it has waived its immunity and has consented to being sued.

[2]*See* S. 829, 98th Cong., 1st Sess. (1983); S. 775, 98th Cong., 1st Sess. (1983); H.R. 595, 98th Cong., 1st Sess. (1983); H.R. 7034, 97th Cong., 2d Sess. (1982); H.R. 6359, 97th Cong., 2d Sess. (1982); S. 1775, 97th Cong., 1st Sess. (1981); H.R. 1696, 97th Cong., 1st Sess. (1981); H.R. 24, 97th Cong., 1st Sess. (1981); S. 695, 96th Cong., 1st Sess. (1979); H.R. 2659, 96th Cong., 1st Sess. (1979); H.R. 193, 96th Cong., 1st Sess. (1979); S. 3314, 95th Cong., 2d Sess. (1978); S. 2868, 95th Cong., 2d Sess. (1978); S. 2117, 95th Cong., 1st Sess. (1977); H.R. 9437, 95th Cong., 1st Sess. (1977); H.R. 9219, 95th Cong., 1st Sess. (1977); H.R. 12,715, 93d Cong., 2d Sess. (1974); S. 2558, 93d Cong., 1st Sess. (1973); H.R. 10,439, 93d Cong., 1st Sess. (1973). These bills, with the exception of the pending S. 775 and S. 829, are collected in T. MADDEN & N. ALLARD, ADVICE ON OFFICIAL LIABILITY AND IMMUNITY (1983). S. 829, submitted to Congress on March 16, 1983 by President Reagan, is the administration's omnibus crime legislation. Title XIII of the bill would make the United States liable for constitutional torts committed by its employees, and would establish the FTCA as the exclusive means or remedy by which the actions of any federal official may be remedied in tort damages.

In 1974, Congress amended the FTCA to permit suits against the government for assault, battery, false arrest, abuse of process, and malicious prosecution by federal investigative or law enforcement officers. Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h) (1976 & Supp. V 1981)); *cf. Amendment of the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 123 (1979) (statement of George Bermann, Professor of Law, Columbia Univ. Law School) (criticizing the statutory distinction between constitutional and nonconstitutional torts as unsound and unnecessary) [hereinafter cited as *1979 House Hearings*]. The 93d Congress, having enacted Pub. L. No. 93-253, failed to act on alternative legislation proposed by the Nixon administration that would have broadened the FTCA to cover claims of constitutional torts committed by government employees. *Federal Tort Claims Amendments: Hearings on H.R. 10439 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 14–15 (1974) (testimony of Irving Jaffe, Acting Ass't Att'y Gen., Civil Div., Dep't of Justice); *see also Intelligence Activities and the Rights of Americans: Final Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, S. REP. NO. 755, 94th Cong., 2d Sess. 336–38 (1976) (recommending a statutorily created federal cause of action against the government and individual federal intelligence officer or agent for actual or threatened injury caused by a violation of the Constitution committed under color of law).

As used in this Article, the term "official" encompasses officials, employees, and other executive-branch personnel of the federal government.

[3]Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 HARV. J. ON LEGIS. 1 (1979).

munity under the FTCA. Section I of the Article discusses the problems that recurrently trouble Congress in its attempts to pass legislation that would mitigate the tension between official liability and sovereign immunity. This background discussion is followed by a description in Section II of the principal bills in the House and the Senate: H.R. 595[4] and S. 775.[5] Both were introduced early in the Ninety-eighth Congress and are nearly identical to legislation that was pending at the close of the Ninety-seventh Congress.

Section III reviews in detail the numerous issues raised by H.R. 595 and S. 775. This Section is comprised of four parts. The first part discusses the retention of the "good-faith immunity" of the wrongdoing official. This is the most controversial issue raised by the two bills. The argument is presented that there is no justification for allowing the federal government to assert an official's qualified immunity or his reasonable good-faith belief in the lawfulness of his action. This argument is grounded both on the belief that the policy basis for good-faith immunity disappears when the official himself is no longer subject to suit and on the belief that allowing the United States to assert such immunity would undercut two major objectives of the legislation: compensation for the victim and accountability of the tortfeasor.

The establishment of an independent administrative disciplinary board is the subject of the second part of this Section. The establishment of such a board would supplement the current disciplinary system for official misconduct, thereby providing an effective deterrent against wrongful conduct by federal officials. In the third part of this Section, it is argued that victims of constitutional torts committed by government officials should be afforded the opportunity to a jury trial and to punitive or additional damages. While there is concern that juries may be overly sympathetic to plaintiffs and consequently may award excessive damages to victims, this problem could be averted by

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[4]H.R. 595, 98th Cong., 1st Sess. (1983), was introduced by Rep. Sam B. Hall (D-Tex.). 129 CONG. REC. H94 (daily ed. Jan. 6, 1983). H.R. 595 is identical to H.R. 7034, 97th Cong., 1st Sess. (1981), the bill that was pending in the House Judiciary Committee at the conclusion of the 97th Congress, having been approved and forwarded by the Subcommittee on Adminstrative Law and Governmental Relations.

[5]S. 775, 98th Cong., 1st Sess. (1983), was introduced by Sen. Charles E. Grassley (R-Iowa). 129 CONG. REC. S2694–97 (daily ed. Mar. 11, 1983). S. 775 is pending in the Senate Committee on the Judiciary. The bill is nearly identical to legislation introduced during the last Congress by Senator Grassley that was reported to the Senate Judiciary Committee after hearings by the Subcommittee on Agency Administration.

setting a ceiling on the amount of punitive damages available for plaintiffs. The last part of Section III briefly reviews the problems of attorney fees, the legislative alternatives pertaining to the liability of former officials, the breadth of liability for constitutional torts committed by federal officials, and the ramifications of the distinction between constitutional and nonconstitutional torts. These matters are found to be critical to legislation dealing with immunity for officials who commit constitutional torts; it is urged that they be carefully considered by Congress.

The conclusion is reached in Section IV that the FTCA should be amended to substitute the United States as the exclusive defendant in all private damage actions for constitutional violations committed by officials while acting within the scope of their office. This legislative amendment should not permit the United States the opportunity to assert defensively the good-faith immunity of the wrongdoing official. In order to ensure the accountability of federal officials and to provide for the deterrence of unlawful and improper conduct, each federal agency should be specifically authorized to use existing administrative controls on officials who have violated the constitutional rights of any person. Moreover, Congress should evaluate the feasibility of establishing an independent disciplinary mechanism to supplement current administrative mechanisms. This would ensure that appropriate disciplinary action would be unfettered by an agency's interest in protecting its employees or its policies, and also would help to shield employees from unfairly being held responsible for agency misconduct.

I. Background

There is wide dissatisfaction with the growing reliance on private damage actions against government officials for violations of constitutional rights.[6] The availability of such actions was proclaimed by the Supreme Court twelve years ago in *Bivens v. Six Unknown Named Agents*,[7] which "established that

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[6] *See, e.g., infra* notes 14–17.

[7] 403 U.S. 388 (1971). In *Bivens*, the petitioner alleged that agents of the Federal Bureau of Narcotics made a warrantless entry and search of his apartment without probable cause. The Supreme Court held that petitioner had a federal cause of action under the Fourth Amendment against the federal officials who allegedly violated his constitutional rights. Although no statutory cause of action for such misconduct was

the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court" directly under the Constitution.[8] Under the doctrine of sovereign immunity, victims of official misconduct cannot sue the government itself for damages absent a congressional waiver of sovereign immunity.[9] Congress has waived such immunity with respect to most common-law torts, but not with respect to violations of constitutional rights such as those alleged in *Bivens*-type actions.[10] Presently, there are more than one thousand pending lawsuits alleging constitutional violations.[11] The increasing reliance on such suits is attributable largely to court decisions that recognize a broad variety of claims available under the *Bivens* doctrine,[12] and to the uncertainty enveloping the availability and scope of official immunity.[13]

The dissatisfaction with the system inaugurated by *Bivens* stems, in part, from the recognition that private damage actions against individual government officials do not afford victims of official misconduct "a financially responsible defendant."[14] Of

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available, the Supreme Court found that a cause of action could be asserted directly under the Constitution.

[8]Carlson v. Green, 446 U.S. 14, 18 (1980) (describing the holding of *Bivens*).

[9]*See, e.g.*, United States v. Testan, 424 U.S. 392, 399 (1976); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1339–56 (2d ed. 1973); *cf.* Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. REV. 597 (1982). Notwithstanding the persuasive case for a judicially created system of governmental liability, *id.*, only legislation can effect the comprehensive changes that such a system would entail.

[10]28 U.S.C. §§ 1346(b), 2671–2680 (1976 & Supp. V 1981). Another major congressional waiver of sovereign immunity is the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1976 & Supp. V 1981) (creating court of claims for suits against the government for money damages).

[11]*Tort Claims: Hearings on H.R. 24, H.R. 3060, and H.R. 3795 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 23 (1982) (statement of Deputy Att'y Gen. Edward Schmults) [hereinafter cited as *1982 House Hearings*]; *see* Bell, *supra* note 3, at 2 n.5.

[12]Indeed, the Supreme Court has indicated that a federal damage remedy for violations of the Constitution is the general rule. Carlson v. Green, 446 U.S. 14, 18 (1980); *see also* Briggs v. Goodwin, No. 80-2269, slip op. at 17–20 (D.C. Cir. Jan. 11, 1983).

[13]Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982), is the Supreme Court's most recent word on the subject. In this case, the plaintiff brought a civil suit against two presidential aides for damages based on his allegedly unlawful discharge from work at the Department of the Air Force. The defendants claimed that they were entitled to absolute immunity. The Supreme Court held, inter alia, that a presidential aide generally is entitled only to qualified immunity unless he can demonstrate that the functions of his office are sufficiently sensitive so as to require absolute immunity. In addition, he must show that he was performing the protected duty when taking the action from which liability allegedly stems. *See generally* Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281.

[14]*Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 2d

equal concern to many is the perception that the threat of personal liability or, at a minimum, the risk of a law suit, has a chilling effect and therefore deters not only improper conduct by government officials, but proper conduct as well.[15] In addition to these concerns is the conviction that the government *ought* to be liable for the wrongs committed in its name, rather than impose the loss upon an individual official "who is more anvil than hammer."[16] Other criticisms of the present system focus on the expense to the government of retaining private counsel to defend individual government officials in *Bivens* suits,[17] and the possibility that the government will have interests at stake that will not be represented adequately when individual officials rather than the government are on trial. The United States Supreme Court has indicated in *Carlson v. Green* that Congress could displace the *Bivens* remedy by "provid[ing] an alternative remedy when it explicitly declared the remedy to be a *substitute* for recovery under the Constitution and viewed as equally effective."[18] A mere ipse

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Sess. 4 (1978) (statement of Att'y Gen. Griffin Bell) [hereinafter cited as *1978 House Hearings*].

[15]*See 1982 House Hearings*, *supra* note 11, at 27 (statement of Deputy Att'y Gen. Edward Schmults); *1978 House Hearings*, *supra* note 14, at 4 (statement of Att'y Gen. Griffin Bell).

[16]Schuck, *supra* note 13, at 347, *reprinted in Federal Tort Claims Act, pt. 2: Hearing on S. 1775 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 35, 101 (1982) [hereinafter cited as *1982 Senate Hearing*].

[17]*See, e.g., 1979 House Hearings*, *supra* note 2, at 3 (statement of Deputy Att'y Gen. Benjamin Civiletti); *Amendments to the Federal Tort Claims Act: S. 2117, pt. 1: Joint Hearing on S. 2117 Before the Subcomm. on Citizens and Shareholders Rights and Remedies and the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 7 (1978) (statement of Att'y Gen. Griffin Bell) [hereinafter cited as *1978 Senate Hearing*]. It has been estimated that the Justice Department has spent over three million dollars for such private counsel. 129 CONG. REC. S2697 (daily ed. Mar. 11, 1983) (statement of Sen. Thurmond). *But see 1979 House Hearings*, *supra* note 2, at 12–13 (Dep't of Justice Memorandum from Ass't Att'y Gen. Patricia Wald to Ass't Att'y Gen. Kevin Rooney, May 7, 1979) (discussing cost estimate for the proposed amendments to FTCA).

Insofar as the substitution of the United States as the defendant in place of the wrongdoing government official would afford plaintiffs "a financially responsible defendant," it is far from obvious that adopting an enterprise liability system would save the government any money at all, except to the extent that legislation establishing such liability would permit the government to settle rather than to pay to litigate cases involving alleged official misconduct. *See 1982 House Hearings*, *supra* note 11, at 248 (statement of Royce Lamberth, Chief, Civil Div., Office of the U.S. Att'y for the Dist. of Columbia).

Thus, it appears that the major gain for the government would be to ensure its complete control over the defense of constitutional tort actions. *See id.* at 237–39 (statement of U.S. Att'y Stanley Harris); *1979 House Hearings*, *supra* note 2, at 3–4 (statement of Deputy Att'y Gen. Benjamin Civiletti).

[18]446 U.S. 14, 18–19 (1980).

dixit to this effect by Congress presumably would not suffice to meet the standards suggested in *Carlson*. A statutory civil sanction system would have to guarantee that persons whose constitutional rights have been violated by officials are adequately compensated, and also would have to perform the deterrent and corrective functions now intended to be served by the *Bivens*-type damage remedy.[19]

Most observers believe, and we agree, that to most effectively serve the primary goals of compensation, deterrence, and fairness in dealing with alleged constitutional violations by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace liability of individual officials with governmental liability for constitutional wrongs done in the public's name.[20]

Legislative efforts to establish such a system so far have foundered on disagreements over the advisability of allowing the United States to assert the qualified immunity of its officials in constitutional tort suits, and over the appropriate substitute mechanisms of deterrence and accountability. Failure to reach agreement on these issues reflects the fact that ensuring compensation and deterrence, and fostering vigorous decisionmaking by federal officials, are often perceived to be incompatible goals.[21] Although bills to establish some form of governmental

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[19]*See id.* at 20–23; *see also* Cutts v. Fowler, 692 F.2d 138, 140 (D.C. Cir. 1982) ("creation of a new statutory remedy does not necessarily displace judicially-created remedies for constitutional deprivations").

[20]Generally, direct government liability is considered preferable to indirect liability through insurance and indemnification programs for officials found liable to a private party. In contrast to the direct liability proposals before Congress, neither insurance nor indemnification would relieve the defendant official of the need to defend lawsuits. There are other problems as well. The adoption of an insurance program could involve the added costs of dealing with the insurer, costs that would not exist in a system of direct liability. Indemnity is troubled by potential conflicts of interest between the government and the defendant official.

Federal officials apparently have difficulty purchasing liability insurance on their own. *See 1978 House Hearings*, *supra* note 14, at 31 (statement of John McNerney, Nat'l President, Fed. Criminal Investigators Ass'n). There is no general statutory indemnification of officials, even where the liability clearly arose within the scope of the official's employment. *See Federal Tort Claims Act, pt. 1: Hearings on S. 1775 Before the Subcomm. on Agency Administration of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 4 (1981) (statement of Deputy Att'y Gen. Edward Schmults) [hereinafter cited as *1981 Senate Hearings*]; Schuck, *supra* note 13, at 373.

[21]*See 1978 Senate Hearing*, *supra* note 17, at 8 (statement of Att'y Gen. Griffin Bell). The current administration has taken the position that "[t]he problem here is not really Government employees acting in an unlawful fashion [but rather] the overhang of litigation and the burden on Government employees of having . . . to be worried about their own cases." *1981 Senate Hearings*, *supra* note 20, at 7–8 (statement of Deputy Att'y Gen. Edward Schmults). The Carter administration, by contrast, took the view that the problem of deterrence was sufficiently serious to warrant a new employee

liability at the federal level have been introduced regularly since *Bivens* was decided,[22] none has been adopted.[23] The bills introduced in the Ninety-eighth Congress illustrate the principal problems involved in the establishment of a system of federal liability for the constitutional wrongs of government officials.

II. Proposed Legislation

A. *H.R. 595*[24]

H.R. 595 would amend the FTCA to provide that the United States would be exclusively liable with respect to a claim arising under the Constitution of the United States for torts committed by government officials acting within the scope of their office or employment.[25] For any constitutional tort claim, the bill provides that the United States would be made liable for the greater of either actual damages or liquidated damages, which would be assessed in an amount that was the greater of either (a) $2,000 or (b) in the case of a continuing violation, $200 per day for each violation.[26] If it is established that the defendant official

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disciplinary mechanism "to replace the sanction against employee misconduct presumably lost by immunizing employees from civil liability." *1979 House Hearings*, *supra* note 2, at 4 (statement of Deputy Att'y Gen. Benjamin Civiletti).

[22] *See supra* note 2.

[23] Of the 16 bills introduced prior to the 98th Congress, only three—H.R. 7034, 97th Cong., 2d Sess. (1982) (in lieu of H.R. 24, 97th Cong., 1st Sess. (1981)), S. 3314, 95th Cong., 2d Sess. (1978), and H.R. 9219, 95th Cong., 1st Sess. (1977)—were even forwarded to full committee by the responsible subcommittee. Not one of these bills ever was reported out of committee.

[24] 98th Cong., 1st Sess. (1983).

[25] H.R. 595 § 202 (proposed 28 U.S.C. § 2699(b)). H.R. 595 and S. 775 provide a remedy against the United States not only with respect to constitutional torts, but also generally in suits based upon acts or omissions of United States officials committed within the scope of office or employment. *See* H.R. 595 § 101 (proposed 28 U.S.C. § 2679(b)); S. 775 § 5(a) (same). Currently, a plaintiff may, as a rule, sue both the official and the government for the same conduct. To do so, the plaintiff must allege a constitutional tort claim against the official under *Bivens*, and a nonconstitutional tort claim against the government under the FTCA. *See* Carlson v. Green, 446 U.S. at 20. Only in a limited set of cases has Congress explicitly made suit against the government under the FTCA an exclusive remedy. *See, e.g.*, 28 U.S.C. § 2679(b) (1976 & Supp. V 1981) (operation of motor vehicles by federal employees); 38 U.S.C. § 4116(a) (1976), 42 U.S.C. §§ 233(a), 2458a (1976 & Supp. V 1981) (malpractice by certain government health personnel). The statutory distinction between constitutional and nonconstitutional torts has been criticized as unsound and unnecessary. *See, e.g.*, *1979 House Hearings*, *supra* note 2, at 123 (statement of George Bermann, Professor of Law, Columbia Univ. Law School).

[26] H.R. 595 § 202 (proposed 28 U.S.C. § 2693). Proposals to replace the *Bivens* remedy typically have provided for liquidated damages to assure successful plaintiffs monetary

acted with malicious intent or reckless disregard for the plaintiff's constitutional rights, additional damages of up to $100,000 would be authorized.[27] A successful claimant also would be entitled to receive reasonable attorney fees and all other litigation costs reasonably incurred, including attorney fees up to twenty-five percent of the judgment, and costs attributable to processing an administrative claim for money damages based on the alleged constitutional tort.[28]

Procedurally under H.R. 595, a suit against an individual government official for an alleged constitutional tort would become a suit against the United States only "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose . . . ."[29] The United States would be free to assert as a defense to a constitutional tort claim "the absolute or qualified immunity of the employee of the government whose act or omission gave rise to the claim, or his reasonable good-faith belief in the lawfulness of his conduct."[30]

Finally, H.R. 595 provides that where a constitutional tort action results in a judgment against the United States or an award, compromise, or settlement paid by the United States, "the Attorney General shall forward the matter to the head of

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recovery where actual damages are small or nonexistent. Such liquidated damages are provided on the premise that proof of concrete injury "is often impossible in the case of nonviolent conduct involving violations of constitutional rights which are of an intangible nature." *1978 Senate Hearing*, *supra* note 17, at 8 (statement of Att'y Gen. Griffin Bell).

[27] H.R. 595 § 202 (proposed 28 U.S.C. § 2693). Notwithstanding the provision for such "additional" damages, H.R. 595 purports to preclude "punitive damages." *Id.* ("[t]he United States . . . shall not be liable . . . for punitive damages.").

[28] *Id.* (proposed 28 U.S.C. § 2698(a)). Under H.R. 595, an action could not be instituted against the United States unless the claim had first been presented to, and denied by, the appropriate federal agency. *Id.* (proposed 28 U.S.C. § 2694(a)). A similar condition applies to suits against the United States under the FTCA. *See* 28 U.S.C. § 2675 (1976).

[29] H.R. 595 § 202 (proposed 28 U.S.C. § 2698(d)(1)). Certification by the Attorney General would trigger removal to federal court of a suit brought in a state court. *Id.* (proposed 28 U.S.C. § 2698(d)(2)). The Attorney General's certification that the defendant official was acting within the scope of his office or employment at the time of the incident would be "binding and conclusive [only] on the United States and the defendant employee," *id.* (proposed 28 U.S.C. § 2698(d)(3)), and not on the party bringing the action.

If a plaintiff successfully challenges the Attorney General's certification upon removal, the district court would be required to remand the case to the state court, inasmuch as the Attorney General's certification was the predicate for removal. *Id.* If the Attorney General did not make such a certification, the defendant official would be allowed to request the federal district court—but apparently not the state court—in which the suit has been filed to certify that the defendant was acting within the scope of his office or employment at the time of the alleged injury. *Id.*

[30] *Id.* (proposed 28 U.S.C. § 2693).

the Federal agency which employed the employee at the time of the employee's alleged act or omission giving rise to the claim . . . for such further administrative investigation or disciplinary action as may be appropriate."[31] H.R. 595 is drafted to preserve the right to a jury trial in constitutional tort cases, a right now provided by the *Bivens* remedy.[32]

B. *S. 775*[33]

The Senate bill is similar to H.R. 595 except for two differences.[34] First, no provision is made under S. 775 for any award to a prevailing plaintiff of attorney fees or other litigation costs, including costs of processing administrative claims. And second, S. 775 does not provide for jury trial in all constitutional tort cases, but only in cases where demand for trial is made prior to or on the date of enactment of the bill.[35]

III. Issues

There is broad bipartisan support for the proposition that the United States, and not individual federal officials, should bear the ultimate financial responsibility for constitutional violations.[36] But differences have arisen over specific elements of

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[31] *Id.* (proposed 28 U.S.C. § 2700).

[32] *Id.* (proposed 28 U.S.C. § 2695). Significantly, the power to award additional damages for malicious constitutional torts is vested under H.R. 595 in the court, not in the jury. *See supra* note 27.

[33] 98th Cong., 1st Sess. (1983).

[34] Under the legislation introduced by Senator Grassley during the 97th Congress, the individual officer and the United States would be jointly liable for punitive damages of up to $50,000 for the employee's willful and malicious violation of constitutional rights. S. 1775, 97th Cong., 1st Sess. § 3(4) (1981) (proposed 28 U.S.C. § 2674(b)(3)) (amendment of Sen. Specter, adopted Sept. 23, 1982). The United States would be entitled to indemnity for any amount paid under this subsection. *Id.* Senator Grassley's current bill does not include this provision. The Senator did include a provision added to S. 1775 during subcommittee mark up to amend 50 U.S.C. § 1810 so that it would not apply to any civil cause of action against an official while acting within the scope of his office or employment. S. 775 § 10. Finally, under S. 775, the maximum amounts allowed for liquidated damages also are lower than those set by H.R. 595—the greater of $1,000 or, in the case of a continuing violation, $100 per day for each day up to a maximum of $15,000. S. 775 § 3(4) (proposed 28 U.S.C. § 2674(b)(2)).

[35] S. 775 § 11(b)(1).

[36] *See, e.g.*, Federal Officials' Liability for Constitutional Violations, 47 Fed. Reg. 58,207 (1982) (to be codified at 1 C.F.R. § 305.82-6) [hereinafter cited as *ACUS Recommendation*]. There also is substantial scholarly support for the proposition. *See* K. Davis, Administrative Law Text § 26.06, at 492–93 (3d ed. 1972); Bermann, *Inte-*

legislation that would create an alternative system of civil sanctions. The following issues are the focus of the current legislative controversy.

A. *Retention of Good-Faith Immunity*

The most significant and hotly disputed issue in the establishment of a system of exclusive governmental liability is whether the government should be allowed, as provided in H.R. 595 and S. 775, to assert as a defense an official's "qualified immunity . . . or his reasonable good-faith belief in the lawfulness of his conduct."[37] We submit that retention of good-faith immunity[38]

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ating Governmental and Officer Tort Liability, 77 COLUM. L. REV. 1175, 1194–1203 (1977). But support for the proposition is not universal. *See 1982 House Hearings*, *supra* note 11, at 431, 435–40 (statement of Thomas Devine, Legal Director of the Gov't Accountability Project (GAP), Inst. for Pol'y Studies). Disputing the premise that the threat of personal liability "functionally paralyzes any conscientious federal employee," *id.* at 435, and that judgment-proof government officials thwart the goal of victim compensation, *id.* at 438–39, GAP proposed a modified version of the then-current House bill H.R. 7034 that would have supplemented, but not supplanted, the *Bivens*-type remedy. *Id.* at 451.

Professor Neuborne of New York University Law School has suggested that the FTCA simply be amended to permit *Bivens* defendants to implead the United States, establishing "a self-executing mechanism [that] would allocate the economic loss caused by a constitutional violation to the proper party." *1981 Senate Hearings*, *supra* note 20, at 29 (statement of Professor Burt Neuborne, Professor of Law, New York Univ. Law School, on behalf of American Civil Liberties Union (ACLU)).

These proposals for an alternative to an exclusive system of governmental liability echo the joint government and official liability recommended by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S. REP. NO. 755, *supra* note 2, at 336–38, and the Senate Committee on Government, S. REP. NO. 588, 93d Cong., 1st Sess. 2–4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 2789 (analyzing proposed amendment to H.R. 8245; H.R. 8245 was enacted into law as Act of Mar. 16, 1974, Pub. L. No. 93-253 § 2, 88 Stat. 50, 50 (codified at 28 U.S.C. § 2680(h) (1976 & Supp. V 1981)), to provide, among other things, a remedy against the United States for certain intentional nonconstitutional torts of its investigative and law enforcement officers). The Carter administration did not favor legislation that would allow a plaintiff to choose between suing the official and suing the government. *1978 Senate Hearing*, *supra* note 17, at 119 (letter from Ass't Att'y Gen. Patricia Wald to Sen. Abourezk (Mar. 13, 1978)).

[37] H.R. 595 § 202 (proposed 28 U.S.C. § 2693); S. 775 § 5(b) (proposed 28 U.S.C. § 2679(d)). The Reagan administration's proposal would allow the government to assert all defenses available to an individual employee, including the absolute or qualified immunity of the employee. S. 829, 98th Cong., 1st Sess. § 1303 (1983) (proposed 28 U.S.C. § 2674). Both H.R. 595 and S. 775 would allow the government to assert the absolute immunity of officials entitled to such immunity. Although many of the arguments for eliminating qualified immunity would seem applicable to absolute immunity, there is a strong consensus in Congress that the government should not be liable for conduct already protected by absolute immunity.

[38] The Supreme Court appears to define qualified immunity as the right to invoke the good-faith defense. *See* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737 (1982). For convenience, the issue of whether to allow the government to assert either the qualified-

in a system that purports to establish exclusive governmental liability is unfounded and ill conceived: it would undermine the objectives of compensation and accountability without relieving officials of the burdens now imposed by *Bivens*-type litigation.[39]

At the outset, it should be understood that nothing in established tort doctrine applicable to every analogous situation of private and public vicarious liability supports the proposition that the United States should be permitted to invoke the good-faith immunity of its officials in constitutional tort suits. At common law, the majority rule in the private employment context is that an employer sued for the tort of an employee under the doctrine of respondeat superior may not invoke the employee's immunities.[40] Moreover, the majority common-law rule in the public employment context at the state and local levels is that a government agency sued for the tort of a public official under the doctrine of respondeat superior may not invoke the official's immunities.[41] Indeed, in FTCA suits, virtually every federal court that has considered the issue has concluded that (a) the doctrine of respondeat superior does not permit the United States to invoke the immunities of its officials,[42] and

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immunity or the good-faith defenses of its officials is discussed herein under the rubric of whether to allow the government to assert the defense of good-faith immunity. The convention is consistent with established usage. *See, e.g.*, Saldana v. Garza, 684 F.2d 1159, 1162–63 (5th Cir. 1982).

Several earlier bills, in contrast to H.R. 595 and S. 775, would have precluded the United States from asserting—except in cases involving a Member of Congress, a judge, a prosecutor, or a person performing analogous functions—the absolute or qualified immunity of the official whose conduct was at issue, or the official's reasonable good-faith belief in the lawfulness of his conduct. *See* H.R. 24, 97th Cong., 1st Sess. § 3 (1981); S. 695, 96th Cong., 1st Sess. § 3 (1979); H.R. 2659, 96th., 1st Sess. § (3) (1979); S. 3314, 95th Cong., 2d Sess. § 3(b) (1978). This approach was supported by the Carter administration. *See infra* note 48. Under S. 2117, 95th Cong., 1st Sess. § 3 (1977) and H.R. 9219, 95th Cong., 1st Sess. § 3 (1977), a federal officer's or employee's "good faith reliance on a court order or legislative authorization" would have constituted a complete defense in a constitutional tort suit against the United States, but the United States would nevertheless have been required to compensate the person whose constitutional rights had been violated.

[39]*But see ACUS Recommendation*, *supra* note 36.

[40]*See, e.g.*, Schubert v. August Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Hallmark Ins. Co. v. Crary Enters., 72 Wis. 2d 472, 475, 241 N.W.2d 171, 173 (1976); RESTATEMENT (SECOND) OF AGENCY § 217 Comment b (1958); 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.17, at 1427 (1956); W. SEAVEY, HANDBOOK ON THE LAW OF AGENCY § 93, at 167 (1964).

[41]*See, e.g.*, James v. Prince George's County, 288 Md. 315, 331–32, 418 A.2d 1173, 1182 (1980); Muntan v. City of Monongahela, 45 Pa. Commw. 23, 26–28, 406 A.2d 811, 813–14 (1979); Maynard v. City of Madison, 101 Wis. 2d 273, 283–84, 304 N.W.2d 163, 169 (1981).

[42]*See* United States v. Trubow, 214 F.2d 192, 196 (9th Cir. 1954); Jackson v. United States, 196 F.2d 725, 726 (3d Cir. 1952); United States v. Hull, 195 F.2d 64, 68 (1st Cir.

(b) Congress did not intend for the United States to be able to invoke the immunities of its officials in suits brought under 28 U.S.C. § 2680(h).[43] Allowing the United States to plead the good-faith immunity of federal officials in constitutional tort suits would afford the government an advantage enjoyed neither by private and public employers at common law, nor by the United States in nonconstitutional tort suits.

The principal argument behind retaining good-faith immunity is that where the official has acted in good faith, not only has no genuine wrongdoing occurred, but a judgment against the government in such cases would lead to an unwarranted imputation of wrongdoing on the official's part.[44] This argument does not withstand close scrutiny. Good-faith immunity is made available to the individual government official not because the official's good faith somehow negates the fact of constitutional injury or because a determination of liability would unfairly stigmatize him. Instead, "underlying the qualified immunity which public officials enjoy for actions taken in good faith is the

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1952); Downs v. United States, 382 F. Supp. 713, 749–51 (M.D. Tenn. 1974), *rev'd on other grounds*, 522 F.2d 990 (6th Cir. 1975). The only decision to the contrary appears to be Brooks v. United States, 152 F. Supp. 535, 537 (S.D.N.Y. 1957).

[43]Four of the five district courts that have considered the issue have reached this conclusion. *See* Picariello v. Fenton, 491 F. Supp. 1020, 1040–42 (M.D. Pa. 1980); Towsend V. Carmel, 494 F. Supp. 30, 36–37 (D.D.C. 1980); Crain v. Krehbiel, 443 F. Supp. 202, 216–17 (N.D. Cal. 1978); Norton v. Turner, 427 F. Supp. 138, 146–52 (E.D. Va. 1977), *rev'd sub nom.* Norton v. United States, 581 F.2d 390, 393–96 (4th Cir. 1978); *see also* Recent Decisions, *Sovereign Immunity*, 47 GEO. WASH. L. REV. 651 (1979) (criticizing Fourth Circuit's *Norton* decision). The Fourth Circuit, declining to rely on the common-law doctrine of respondeat superior, has held that Congress intended to permit the United States to plead the qualified immunity of its officials in suits under 28 U.S.C. § 2680(h) (1976 & Supp. V 1981). Norton v. United States, 581 F.2d 390, 393–96 (4th Cir. 1978), *rev'g* 427 F. Supp. 138, 146–52 (E.D. Va. 1977); *cf.* Downs v. United States, 522 F.2d 990, 998 (6th Cir. 1975) (holding that immunity of police officer from damage suit is not available to government under FTCA where basis of officer's immunity is policy of encouraging uninhibited exercise of discretion).

[44]*See 1982 House Hearings*, *supra* note 11, at 334 (statement of Donald Baldwin, Executive Director, Nat'l Law Enforcement Council); *id.* at 343–44 (statement of Ira Lechner, Legislative Counsel, Nat'l Ass'n of Police Orgs.); *id.* at 138 (statement of Joseph Morris, Gen. Counsel, Office of Personnel Management).

Viewed in this light, good-faith immunity is close to a denial not only of culpability but also that any *injury* has occurred. Thus, Deputy Attorney General Edward Schmults has stated the administration's view that good-faith immunity

> really goes to the merits of the plaintiff's claim by testing the action of an employee against the standard of reasonableness and good faith . . . . And certainly no employee wants to be found "guilty," if you will, of unconstitutional acts and suffer the resulting stigma. So that, even where the United States and not the employee would be the defendant, our view is that employees would be discouraged from acting in uncertain areas where they might subject the Government to financial liability.

1981 Senate Hearings, *supra* note 20, at 9.

fear that exposure to personal liability would otherwise deter them from acting at all.'"[45] Although a government official's good faith may be relevant to whether a party whose constitutional rights have been violated should be entitled to compensation from the official, the official's good faith cannot be relevant to whether the victim is entitled to compensation from the government.[46] Allowing the government to assert good-faith immunity also would limit the operation of any disciplinary mechanism that would be triggered by a determination of liability or settlement by the government.[47] At least in the view of the current administration, disciplinary proceedings would be activated only when the official had intentionally violated the plaintiff's constitutional rights.[48]

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[45]Carlson v. Green, 446 U.S. at 21 n.7 (*citing* Butz v. Economou, 438 U.S. 478, 497 (1978)); *see* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (city may not assert good faith of its officers as defense to a 42 U.S.C. § 1983 action); Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). As FBI Director William Webster has stated, good-faith immunity "is for the individual protection of the agent." *1978 House Hearings*, *supra* note 14, at 97.

[46]*See* Norton v. United States, 581 F.2d at 398 (Butzner, J., dissenting); *1979 House Hearings*, *supra* note 2, at 126–27 (testimony of George Bermann, Professor of Law, Columbia Univ. Law School). As Deputy Attorney General Benjamin Civiletti testified:

> the good faith defense doesn't mean that the conduct is not regrettable, terribly negligent, that everyone doesn't feel awful remorse about it, and there hasn't been real harm or substantial harm, if not physically, to money values or at least to the dignity of the individual and the privacy of the individual.
>
> I will give you a quick example. Investigators, three of them, go to a home of suspects looking for racketeering—numbers, or whatever. When they go in the home and they are queried about it later, each one says he thought the other had a search warrant. None of them had a search warrant.
>
> They find a man and woman 75 years old in there. They take the woman and strip the woman down and do cavity searches and whatever—in the wrong home.
>
> That is not a gift when you are talking about compensation for that kind of wrong under the fourth amendment.

1979 House Hearings, *supra* note 2, at 19.

[47]*See* H.R. 595 § 202 (proposed 28 U.S.C. § 2700); S. 775 § 5(c) (proposed 28 U.S.C. § 2679 (f)).

[48]To be sure, even if the government were permitted to assert good-faith immunity, the agency that employed the official whose conduct was challenged theoretically would be free to initiate its own internal investigation and disciplinary proceedings under existing law at any time, irrespective of the pendency of the lawsuit. But the current administration has strongly implied that a determination of liability or money settlement by the United States would be a necessary predicate for disciplinary action against the defendant official. *See 1981 Senate Hearings*, *supra* note 20, at 9 (testimony of Deputy Att'y Gen. Edward Schmults) (arguing against waiver of good-faith immunity on ground that disciplinary proceedings would be triggered by determination of liability, and that where the official has acted in good faith "there should be no disciplinary proceedings").

As initially drafted (in the form of H.R. 24), H.R. 7034, 97th Cong., 2d Sess. (1982), was criticized by some for eliminating good-faith immunity in constitutional tort suits. *See 1982 House Hearings*, *supra* note 11, at 341 (statement of J. Brian Hyland, President, Ass'n of Fed. Investigators); *id.* at 343–45 (statement of Ira Lechner, Nat'l Ass'n of Police Orgs.). The original good-faith waiver in H.R. 24 was specifically endorsed

As for the claim that a determination of liability absent bad faith would unfairly stigmatize the defendant official, it must be remembered that in such a case the official did commit a constitutional injury, even though his conduct may have been unintentional—even well-meant. Solicitude for the wrongdoer's reputation should not be allowed to override the victim's right to a remedy, especially when there is no possibility of recovering damages from the official.[49] Moreover, the official's good faith should not be allowed to remove the basis for disciplining him on grounds other than intent, such as negligence or incompetence. In short, there is simply no reason why an official should not be held accountable for his misfeasance.[50]

Congress, of course, may specifically provide by legislation that no finding of liability on the government's part in a constitutional tort case shall give rise to any adverse inference as to

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by, among others, the Federal Executive and Professional Association (FEPA), *see id.* at 328 (statement of Richard Pelz, President, FEPA), and waiver of immunity under earlier legislative proposals was supported by the FBI, *see 1979 House Hearings*, *supra* note 2, at 80 (statement of William Webster, Director, FBI) and by the Carter administration, *see 1978 House Hearings*, *supra* note 14, at 14 (statement of Irving Jaffe, Deputy Ass't Att'y Gen., Civil Div., Dep't of Justice), as well as by the American Bar Association, *1979 House Hearings*, *supra* note 2, at 152 (statement of B. James George, Jr., Former Chairperson, Criminal Justice Section, ABA).

[49] In actions for declaratory and injunctive relief, the good faith vel non of government officials is not an issue in determining whether such relief should be awarded. *See generally* Note, *supra* note 9, at 604, 607–17. If a constitutional violation has occurred, a court must enjoin its continuance whether or not the officials involved had a good-faith belief in the legality of their actions. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975); Knell v. Bensinger, 522 F.2d 720 (7th Cir. 1975); National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); *see also* McCormick v. Attala County Bd. of Educ., 541 F.2d 1094 (5th Cir. 1976); Hutchinson v. Lake Oswego School Dist. No. 7, 519 F.2d 961 (9th Cir. 1975); Hupart v. Board of Higher Educ., 420 F. Supp. 1087, 1107–08 (S.D.N.Y. 1976); Demkowicz v. Endry, 411 F. Supp. 1184 (S.D. Ohio 1975).

[50] Public Citizen (a nonprofit, public interest organization) criticized H.R. 7034, 97th Cong., 2d Sess. (1982), for its original *limited* retention (in H.R. 24) of good-faith immunity with respect to the conduct of Members of Congress, judges, prosecutors, or others performing analogous functions. *1982 House Hearings*, *supra* note 11, at 357–58 (statement of Alan Morrison, Director of Litig., Public Citizen). Presumably, new legislation proceeding along those lines would now provide for retention of immunity with respect to the conduct of the President as well. *See* Nixon v. Fitzgerald, 102 S. Ct. 2690, 2705 (1982). Nevertheless, there would appear to be some merit to Mr. Morrison's contention that "all the reasons that lead to the elimination of the good-faith defense in all other situations apply here." *1982 House Hearings*, *supra* note 11, at 357 (statement of Alan Morrison). If the concern is to spare such officials the ordeal of administrative proceedings in the event that liability is established, future legislation might be drafted to bar any administrative investigation or proceeding against such officials upon a showing that an otherwise available immunity could have barred recovery in a given case in which liability was found. The power of Congress to abrogate the judicially established absolute or qualified immunity of any federal official, even without transferring liability to the United States, seems clear. *See* Nixon v. Fitzgerald, 102 S. Ct. at 2719 n.27.

the official's good faith. Indeed, it would appear sound for Congress to provide that once the United States has been substituted for an official in a constitutional tort suit, the official shall be free to treat that suit—for instance, in answering questions of potential creditors, employers, or others—as though he never had been named as a defendant. Congress also could provide specifically that the defendant official is entitled to assert a good-faith defense in any administrative investigation or disciplinary proceeding under the statute.[51]

Waiver of good-faith immunity by the government is necessary to reduce the official's involvement in litigation. Such a waiver also would operate to limit discovery and facilitate the disposition of claims.[52] Reducing constitutional tort suits to two issues—did a violation of the plaintiff's constitutional rights occur, and was that injury caused by a government official acting within the scope of his office or employment—could simplify trials and encourage early settlement.[53]

Proponents of the government's retention of an official's good-faith immunity often note that the recent Supreme Court decision of *Harlow v. Fitzgerald* was intended to simplify the

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[51] *See* H.R. 595 § 202 (proposed 28 U.S.C. § 2700). As Deputy Assistant Attorney General Irving Jaffe noted in connection with legislation supported by the Carter administration, "in any disciplinary proceeding, the good faith of the employees will be very much an issue, and if [a defendant official] can establish that he had a good-faith belief that what he was doing was lawful and proper, then disciplinary proceedings on that basis would not proceed." *1978 House Hearings*, *supra* note 14, at 14.

[52] *1982 Senate Hearing*, *supra* note 16, at 125. As the Justice Department observed in commenting on the cost impact of earlier legislation providing for waiver of good-faith immunity:

> Major discovery savings would . . . accrue to the agencies and departments employing those individuals who have been sued. Currently, the burden on an agency can be immense. The FBI, for example, has had to examine hundreds of thousands of documents in connection with suits against individuals. In addition to the savings associated with the discovery process, simplification of the issues involved in a constitutional tort action will reduce the amount of attorney time necessary for each case.

1979 House Hearings, *supra* note 2, at 13 n.1 (Dep't of Justice Memorandum of May 7, 1979).

[53] "The strength of the official's good-faith immunity has been an important element in settlement discussions. *1982 House Hearings*, *supra* note 11, at 251 (testimony of Royce Lamberth, Chief, Civil Div., Office of the U.S. Att'y for the Dist. of Columbia). The assertion of good-faith immunity may be expected frequently to postpone settlement pending appellate review of a district court's ruling on summary judgment for either party with respect to the so-called "objective" factors upon which good-faith immunity must now rely. *See, e.g.*, McSurely v. McClellan, 697 F.2d 309, 315–16, 321 n.20 (D.C. Cir. 1982) (post-*Harlow* opinion); *see also* Forsyth v. Kleindienst, No. 82-1812, slip op. at 3, 4 & n.2 (3d Cir. Jan. 20, 1983) (opinion sur grant of stay) (acknowledging that appealing denial of summary judgment on qualified-immunity issue is "not free from difficulty" after *Harlow*).

trial of the good-faith issue.[54] Although *Harlow* may have somewhat simplified litigating the good-faith issue with respect to the question of unclear applicable law, other subjective elements certainly remain to be asserted or denied in establishing the official's state of mind, and thus the difficulty surrounding proof of good faith will continue to complicate suits alleging official misconduct. This forecast is borne out by post-*Harlow* cases.[55]

Another argument advanced in favor of retaining good-faith immunity for the government in constitutional tort suits is that waiver of immunity would enable plaintiffs to "prevail more easily, thereby increasing economic costs to the [g]overnment."[56] As to this argument, it should be noted that any increased cost to the government by virtue of its expanded liability will be offset to some extent by the savings that would result from both the simplification of the litigated issues and the incentive for early settlement. And, certainly, the "economic costs to the government" may be moderated by setting liquidated damages in a reasonable amount.[57] But there is a more compelling reason for allowing recovery: "[W]here someone has a genuine grievance—where someone has a genuine claim that he has been deprived of a constitutional right—we ought to afford him avenues of relief without regard to cost. We cannot put a price on constitutional liberties."[58]

If legislation removes the liability of officials for constitutional torts, the policy choice is whether the government or the victim

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[54]102 S. Ct. 2727, 2736–39 (1982). Defining "[q]ualified or 'good faith' immunity," the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 2738. This "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law," *id.* at 2739, supersedes reliance on both objective factors and subjective factors (*i.e.*, "permissible intentions") in determining whether an official acted in good faith. *Id.* at 2737.

[55]*See, e.g.*, Briggs v. Goodwin, No. 80-2269 (D.C. Cir. Jan. 11, 1983); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); Dale v. Bartels, 552 F. Supp. 1253 (S.D.N.Y. 1982); *cf.* Sampson v. King, 693 F.2d 566 (5th Cir. 1982); Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982); United States v. Irving, 684 F.2d 494 (7th Cir. 1982); Standridge v. City of Seaside, 545 F. Supp. 1195 (N.D. Cal. 1982). Indeed, the Reagan administration's most recent position on the subject appears to concede that considerable litigation will occur. The administration curiously argues that such litigation is beneficial. *See* 129 CONG. REC. S3154 (daily ed. Mar. 16, 1983).

[56]*1982 House Hearings*, *supra* note 11, at 138 (statement of Joseph Morris, Gen. Counsel, Office of Personnel Management).

[57]*See supra* note 34.

[58]*1982 House Hearings*, *supra* note 11, at 141 (testimony of Joseph Morris, Gen. Counsel, Office of Personnel Management) (arguing that the possibility of increased damage awards by virtue of substitution of the government as defendant in constitutional tort suits is a risk worth taking).

should bear the loss. We can discern no substantial public interest that would be served by requiring individual citizens who are harmed by even well-intentioned officials to bear the cost of constitutional injury. The loss is a cost of government activity and should be borne by the public.

B. *Substitution of Effective Mechanisms of Deterrence*

The Supreme Court has specifically emphasized "the doubt . . . cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees" who violate constitutional rights.[59] The Court has implied that the threat of disciplinary action under existing mechanisms is, at most, a supplement to, and not a substitute for, the deterrence imposed by the risk of personal liability.[60]

A basic question, then, for legislation replacing official liability with governmental liability is how to ensure that the substitute deterrent mechanism will serve the goal of measured deterrence the *Bivens* remedy was designed to promote. The approach taken in H.R. 595 and S. 775 is one of bare reliance on existing mechanisms.[61] In this respect, the bills are in marked contrast to earlier proposals whose somewhat elaborate provisions for administrative action upon a determination of liability,

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[59]Carlson v. Green, 446 U.S. at 21 & n.8, *citing 1978 House Hearings*, *supra* note 14, at 6 (statement of Att'y Gen. Griffin Bell).

[60]*Id.* at 21. The efficacy of existing mechanisms has been questioned especially in the context of the law enforcement and the intelligence agency abuses revealed during the last decade. *See 1979 House Hearings*, *supra* note 2, at 45 & n.32 (statement of Karen Christensen, Legislative Counsel, ACLU); *see also* U.S. DEP'T OF JUSTICE, REPORT CONCERNING INVESTIGATION AND PROSECUTORIAL DECISIONS WITH RESPECT TO CENTRAL INTELLIGENCE AGENCY MAIL OPENING ACTIVITIES IN THE UNITED STATES (1977); Association of the Bar of the City of New York, Committee on Civil Rights, *Intelligence Agency Abuses: The Need for a Temporary Special Prosecutor*, 31 REC. A.B. CITY N.Y. 601 (1976); *Prosecution for Domestic Spying Rejected in 1977*, N.Y. Times, Mar. 15, 1982, at A12, col. 2 (describing contents of 1976 report by Justice Department acknowledging apparent violation of "fundamental constitutional rights" by federal agencies and officials, but recommending against criminal prosecution).

One witness noted in hearings on H.R. 2659, 96th Cong., 1st Sess. (1979), the egregious lack of deterrent mechanisms for certain federal officials in connection with the FBI's administrative inquiry into illegal investigative activities directed against the Weather Underground. Of 61 special agents and seven supervisors suspected of illegal entries, illegal wiretaps, and numerous illegal mail openings, disciplinary action was taken against only two of the agents and four of the supervisors. *1979 House Hearings*, *supra* note 2, at 45 & n.32 (statement of Karen Christensen, ACLU).

[61]*See* H.R. 595 § 202 (proposed 28 U.S.C. § 2700); S. 775 § 5(c) (proposed 28 U.S.C. § 2679 (f)); *cf. ACUS Recommendation*, *supra* note 36.

and for subsequent judicial review, may have accounted for their failure to have been adopted.[62]

Plainly some middle ground must be found. An administrative mechanism that depends on an agency's inclination to repudiate the conduct of its officials cannot be expected to foster public confidence that officials either will be made to account for their actions, or will be effectively dissuaded from future misconduct.[63] On the one hand, an agency may be reluctant to punish officials who have committed wrongful acts in the belief that "they were doing their duty to their country and to their agency."[64] At the same time, however, internal proceedings may afford the agency an opportunity to make the defendant official serve as a scapegoat for the wrongdoing of his superiors, or in retaliation for "whistleblowing." Indeed, administrative proceedings arising from constitutional torts committed by defendant officials frequently involve claims implicating agency policy or policymakers and thereby compromise the agency's impartiality.

For this reason, some have urged that disciplinary proceedings should "not be conducted by the head of the agency in which the employee or employees work," but instead that an independent body should be designated for that purpose.[65] Reliance on an independent body would remove the discharge of disciplinary responsibilities from those with the most incentive to misuse it. Presumably, this would meet a few of the concerns aired by members of the Carter administration and public interest groups, both of which had argued for victim participation in independent disciplinary proceedings as "essential" to any

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[62] *See* H.R. 2659, 96th Cong., 1st Sess. § 8 (1979); S. 695, 96th Cong., 1st Sess. § 12(a) (1979); S. 3314, 95th Cong., 2d Sess. § 13 (1978). H.R. 2659 and S. 695 were proposals supported by the Carter administration.

[63] The concerns expressed go beyond the law enforcement and intelligence context. Senator Howard Metzenbaum (D-Ohio) stated, to Attorney General Bell's expression of assent, that:

> [I]n the case of employees [accused of wrongdoing], you have to have some kind of a review board that is totally unresponsive to the agency that is itself involved in the alleged wrongdoing. Or else the person who claims to have been wronged will never feel that they got justice; and probably the American people, when they learn about it, will not think they got justice. It will always be suspect—whether it is the CIA investigating its own people, or Cointel, or whether it is HEW or any other agency.

1978 Senate Hearing, *supra* note 17, at 13.

[64] *1979 House Hearings*, *supra* note 2, at 127 (remarks of Rep. Robert McClory (R-Ill.)).

[65] *1982 House Hearings*, *supra* note 11, at 330–31 (statement of Richard Pelz, FEPA).

"meaningful substitute" for the existing mechanism of actual and punitive damages.[66]

One approach along these lines would be to establish, for independent investigation and, in appropriate cases, for prosecution of disciplinary proceedings, an Office of Disciplinary Counsel modeled on the existing Office of Special Counsel under the Civil Service Reform Act of 1978.[67] Another approach would be to utilize the Merit Systems Protection Board (MSPB) as a disciplinary body.[68]

The objective of independent control should not be to replace or needlessly duplicate the existing administrative disciplinary system. The agency that employs the official whose conduct has been challenged should continue to be responsible in the first instance for investigating and, where appropriate, for disciplining the official or for implementing other corrective steps even prior to the outcome of the constitutional tort suit against the government. Because existing disciplinary mechanisms are directed toward conduct related to job performance and are designed to promote administrative efficiency, it also would be desirable for Congress, quite apart from the need for indepen-

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[66]Under current law an investigation may, of course, result from a victim's complaint, *e.g.*, 5 U.S.C. § 1206 (Supp. V 1981), but there is no automatic initiation of an investigation upon a private complaint. *See 1982 House Hearings*, *supra* note 11, at 361 (statement of Alan Morrison, Director of Litig., Public Citizen); *1978 Senate Hearing*, *supra* note 17, at 6 (statement of Att'y Gen. Griffin Bell) (advocating "procedures in which the injured person can participate in a meaningful way"). In its testimony on H.R. 24, 97th Cong., 1st Sess. (1981), Public Citizen called for the creation of:

> (1)[T]he right of the victim to initiate an investigation which cannot be terminated without adequate reasons;
> (2)the right of the victim to participate in an appropriate manner in the investigation and subsequent disciplinary proceedings, if any; and
> (3)the right of the victim to agency, and ultimately judicial, review if no punishment is meted out, or if the punishment is wholly inadequate for the violation.

1982 House Hearings, *supra* note 11, at 361 (statement of Alan Morrison). These recommendations were incorporated in legislation supported by the Carter administration. *See* Bell, *supra* note 3, at 12–13.

[67]Pub. L. No. 95-454 § 202, 92 Stat. 1111, 1121 (codified at 5 U.S.C. §§ 1201–1209 (Supp. V 1981)). Establishing an Office of Disciplinary Counsel was proposed by the Fund for Constitutional Government. *See 1979 House Hearings*, *supra* note 2, at 74. The Special Counsel is already authorized to investigate abuses of authority in the context of prohibited personnel practices. 5 U.S.C. § 1206(a)(4) (Supp. V 1981).

[68]*1982 House Hearings*, *supra* note 11, at 311 (testimony of Richard Pelz, FEPA), *citing* 5 U.S.C. § 1207 (Supp. V 1981) (authorizing MSPB to impose disciplinary sanctions). The MSPB is authorized, inter alia, to hear and adjudicate allegations of prohibited personnel practices, 5 U.S.C. § 1205(a) (Supp. V 1981), and to enforce compliance with its orders by any federal agency or employee. *Id.* § 1205(a)(2). Compliance may be enforced by orders that salary payments be withheld pending compliance. *Id.* § 1205(d)(2).

dent disciplinary controls, to provide explicit authorization for applying existing disciplinary mechanisms to official misconduct that causes constitutional injuries.[69]

C. *Jury Trial and Additional Damages*

In rejecting the argument that the FTCA provides as effective a remedy as that of *Bivens*-type actions, the Supreme Court has specifically stressed the availability of a jury trial and punitive damages in *Bivens* suits.[70] Opposition to jury trials in *Bivens*-type cases stems largely from the belief that juries are biased in such situations in favor of plaintiffs. This notion has not impressed the Court.[71] In view of the small number of judgments in favor of plaintiffs in *Bivens* suits,[72] concern with this issue does not appear to be serious. Admittedly, juries may be more ready to award damages against the "deep pocket" government than against individual *Bivens* defendants. But any legitimate concern about the risk of excessive jury awards should be met by setting a ceiling on the amount of damages, especially those that may be awarded for a constitutional tort committed with malice, and not by denying the plaintiff either such damages altogether or the the right to a jury trial.

Needless to say, punitive damages that otherwise would be available against an official are more properly cast as additional or exemplary when the government becomes the defendant. The object of assessing such damages against the government is not to punish the sovereign. Instead, the object is to express sharp

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[69] *See ACUS Recommendation*, *supra* note 36.

[70] Carlson v. Green, 446 U.S. at 22-23. A jury trial is currently provided for under the FTCA only in civil actions against the United States for the recovery of internal revenue taxes erroneously or illegally assessed or collected, penalties collected without authority, or any other sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws. 28 U.S.C. § 2402 (1976).

The Supreme Court noted that punitive damages may be the only significant remedy available where constitutional rights are maliciously violated and the victim cannot prove compensable injury. 446 U.S. at 22 n.9. This problem would not arise under legislation such as H.R. 595 and S. 775, which provide for liquidated as well as actual damages.

[71] Carlson v. Green, 446 U.S. at 22-23.

[72] According to Deputy Attorney General Schmults, "several thousand" constitutional tort actions had been filed as of October 1981, but only nine had resulted in money judgments against federal employees. *1982 House Hearings*, *supra* note 11, at 23; *see* Bell, *supra* note 3, at 2 n.5 (listing seven cases in which money judgments had been entered for plaintiffs in *Bivens* actions). The number of cases settled by the parties is unknown.

social disapproval of constitutional torts committed with malice, to spur the government to exercise administrative controls, and to minimize the possibility that such conduct will recur.[73]

It also should be noted that allowing additional damage awards against the United States in appropriate cases may be constitutionally *required* on the theory that Congress may not strip the federal judiciary of the power to fashion remedies held necessary to ensure the protection of constitutional rights.[74] At least in the context of civil rights litigation, the Court has suggested that some availability of punitive damages is necessary.[75] Whether the right to jury trial in constitutional tort cases may be eliminated would seem to depend, at least in part, on the credibility of the requisite congressional declaration that the new nonjury trial remedy would be "equally effective" as the existing jury trial remedy.[76]

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[73] *See 1982 House Hearings*, *supra* note 11, at 328–29 (statement of Richard Pelz, FEPA) ("[T]he Attorney General in settling a suit [should be allowed] to agree to punitive damages, which would constitute a statement on his part that the action of the Federal employee or employees transcended the bound[s] of acceptability and excuse."). Although subjecting the government to punitive damages liability for the bad faith of officials without permitting the government to assert a qualified-immunity defense for the good faith of officials seems asymmetrical, this result is consistent with broader principles of tort law. Good intent does not ordinarily immunize the tortfeasor while bad intent may increase his liability.

[74] *See 1981 Senate Hearings*, *supra* note 20, at 25–26 (statement of Burt Neuborne, Professor of Law, New York Univ. Law School); *cf.* Jacobs v. United States, 290 U.S. 13, 16–17 (1933) (constitutional requirement of just compensation held to require inclusion of interest in damage awards: "[T]he right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate."). *See generally* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

[75] In holding on policy grounds that municipalities ought not to be liable for punitive damages under 42 U.S.C. § 1983 (1976 & Supp. V 1981), the Court relied on the availability of punitive damages against the offending official. City of Newport v. Fact Concerts, Inc., 101 S. Ct. 2748, 2761 (1981). "In our view," the Court stated, "this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office." *Id.* But if Congress adopts a system of exclusive governmental liability, the availability of punitive damages against the offending official could not be relied upon to "directly advance[] the public's interest in preventing repeated constitutional deprivations." *Id.* The legislative alternative that would create partial exclusive government liability, leaving officials themselves liable for punitive damage, is unsatisfactory. This would virtually eliminate any benefits to be gained by removing officials from *Bivens*-type suits because punitive damages could be expected to be, and are in fact, pleaded as a matter of course.

[76] Carlson v. Green, 446 U.S. at 19. To be sure, H.R. 24, 97th Cong., 1st Sess. § 3 (1981), declares that the exclusive remedy against the United States "shall be deemed an equally effective substitute for any recovery against any employee of the United States for tort claims arising under the Constitution." Although the Supreme Court in

Allowing malice, the normal prerequisite for punitive damages, to be placed in issue at trial may entail some sacrifice of the litigation economies achieved by waiver of good-faith immunity. But such economies would not be lost completely because good faith would be eliminated as an issue at trial, thus simplifying the liability determination. If additional damages are available against the government, it might be desirable to litigate cases in two stages: the first stage would determine whether there is any liability and the second, to determine the issue of malice, would be necessary only if liability is established.[77] Such bifurcation could avoid problems that the prospect of punitive damages might otherwise generate. Whatever the merits of the proposal, there does not appear to be strong congressional support for any provision authorizing damages that could be construed as intended to punish or penalize the government.

D. Other Issues

1. *Attorney Fees.*

As noted above,[78] H.R. 595, but not S. 775, provides that a prevailing plaintiff would be entitled to reasonable attorney fees and costs.[79] The debate over this issue is familiar. Noting that attorney fees are not available to successful plaintiffs in nonconstitutional tort suits, some argue that the possibility of attorney fees only would encourage litigation and inspire "artful pleading" by lawyers to set forth constitutional rather than nonconstitutional tort claims whenever possible.[80] But the same considerations that support awarding attorney fees in cases where civil rights have been violated would seem to apply here

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Carlson stated that a *Bivens*-type action *may* be defeated by such a declaration, 446 U.S. at 19–20, the validity of the declaration itself surely would be subject to judicial review.

[77] FED. R. CIV. P. 42. Although bifurcated trials in cases not involving third-party claims usually involve only liability and damages phases—distinguishing between the merits of the claim and the remedy—courts under some circumstances have bifurcated trials into two merits phases. *See* North Cent. Airlines v. Continental Oil Co., 574 F.2d 582, 587 (D.C. Cir. 1978); Berman v. Gerber Prods., 454 F. Supp. 1310, 1316 (W.D. Mich. 1978).

[78] *See supra* text accompanying notes 28 & 35.

[79] H.R. 595 § 202 (proposed 28 U.S.C. § 2698(a)).

[80] *1982 House Hearings*, *supra* note 11, at 341 (statement of J. Brian Hyland, President, Ass'n of Fed. Investigators); *see id.* at 284 (statement of Sec. and Exch. Comm'n); *id.* at 258, 261 (statement of William Taft IV, Gen. Counsel, Dep't of Defense).

as well.[81] In short, the attorney-fees issue has its own momentum and will be determined by forces beyond the relatively narrow context of constitutional torts.

2. *Former Officials.*

H.R. 595 and S. 775 appear to cover claims for acts or omissions committed by former government officials while in government service. But neither bill provides an administrative mechanism for bringing the former officials to account for their wrongful conduct. The need for such an administrative mechanism was recognized in a Carter administration bill.[82] Under the Carter bill, former officials could elect either to be sued individually after leaving government service, or to have the government substituted in their place. In choosing the latter, the former official would have agreed to submit to a disciplinary proceeding that could have resulted in a fine equal to as much as one-twelfth of the annual salary earned at the time the act or omission occurred.[83] Regardless of the merits of the approach embodied in the Carter administration bill, it seems anomalous to place beyond accountability officials who had chosen to leave government service before a determination of liability. Of course, offering some wrongdoers an incentive to leave office might not always be a totally unsatisfactory result.

3. *"Scope of Office" versus "Color of Law".*

An important issue presented by the Attorney General certification requirement under H.R. 595 and S. 775 is whether it is advisable to use a "scope of office or employment" requirement or a broader criterion of "color of law," thereby following the criterion of liability applicable to state and local officials under 42 U.S.C. § 1983.[84] The broader color of law criterion would

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[81] *See* 42 U.S.C. § 1988 (1976 & Supp. V 1981); S. REP. NO. 1011, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5910:

> [C]ivil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> . . . If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

See also id. (noting that Congress, since 1870, has authorized such fee shifting under more than 50 laws).

[82] H.R. 2659, 96th Cong., 1st Sess. (1979).

[83] *Id.*; *see 1979 House Hearings*, *supra* note 2, at 81 (statement of William Webster, Director, FBI) (praising former employee provision as "fair and worthwhile").

[84] This was the approach embodied by the Carter administration bill, H.R. 2659; *see 1979 House Hearings*, *supra* note 2, at 8 (statement of Deputy Att'y Gen. Benjamin

increase the prospect of liability and thereby seems better as a matter of public policy. Such an approach

> is more consistent with the values of full compensation and loss-spreading for injuries somehow connected with governmental action. It would more effectively relieve the official of the prospect of personal litigation and liability, which is one of the chief purposes behind [the proposed legislation]. Finally, it would often avoid the necessity of premature threshold determinations on the question whether the employee was acting within the scope of his authority or solely under color of office. Both in terms of its relevance and its feasibility, this determination is best left to the disciplinary phase of the affair.[85]

At present, the political support for applying a color of law criterion in a federal context appears to be negligible. Before exposing the United States to liability that is vastly greater than that under the *Bivens* doctrine, prudence dictates a more limited experiment; liability of the United States should be established only when an official has committed a constitutional tort within the scope of his office or employment.[86]

4. *Constitutional versus Nonconstitutional Wrongs.*

H.R. 595 and S. 775 both distinguish between constitutional and nonconstitutional torts.[87] The distinction is significant insofar as the existing *Bivens* remedy for constitutional torts provides plaintiffs with rights not afforded plaintiffs in FTCA suits against the government, such as the right to jury trial and the right to punitive damages.[88] The availability of such "extra" rights has been understood to render the *Bivens* remedy "more effective" than the FTCA remedy.[89]

The problem posed by the distinction between constitutional and nonconstitutional torts is that in practice, factual differences

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Civiletti), *1978 Senate Hearing*, *supra* note 17, at 39–40 (S. 2117), as well as by earlier legislative proposals. *See* S. REP. No. 588, *supra* note 36, at 34; S. REP. No. 755, *supra* note 2, at 337–38.

[85] *1979 House Hearings*, *supra* note 2, at 124 (remarks of George Bermann, Professor of Law, Columbia Univ. Law School).

[86] Under H.R. 595 and S. 775, an individual government official would remain personally liable for constitutional misconduct committed outside of the scope of his office or employment, but under color of law. The bills do not, and could not, purport to provide an "equally effective" substitute for the existing system of treating such misconduct. *Bivens*, 403 U.S. at 397.

[87] *See supra* note 2.

[88] *See* Carlson v. Green, 446 U.S. at 22; Casto, *Government Liability for Constitutional Torts: Proposals to Amend the Federal Tort Claims Act*, 49 TENN. L. REV. 201, 240–41 (1982) (differences between FTCA and *Bivens* suits charted).

[89] Carlson v. Green, 446 U.S. at 20–23.

between the two types of tort are sometimes difficult to discern. A single set of facts may give rise to a cause of action under both a constitutional and a nonconstitutional tort theory. In *Carlson v. Green*, for example, the Supreme Court acknowledged that the conduct at issue gave rise to claims under the Eighth Amendment and under the FTCA.[90] If legislation making the United States liable for constitutional torts preserves for plaintiffs who allege such torts the extra rights available to *Bivens* plaintiffs, while precluding FTCA plaintiffs from exercising such rights, much litigation may be devoted to the appropriate theory of liability in any given case.[91]

One way to avoid such litigation would be to abolish the distinction between constitutional and nonconstitutional torts—a distinction that has been criticized as unsound and unnecessary.[92] As a practical matter, this could be accomplished either by extending the extra *Bivens* rights to nonconstitutional suits, or by eliminating such extra rights altogether from constitutional tort suits against the government.[93]

In our view, the distinction between constitutional and nonconstitutional torts should be preserved. Although the facts of some cases may support claims of both constitutional and nonconstitutional injury, this will not be so in every case. The protections afforded by the Constitution and the common law are not coextensive. If they were, the Supreme Court has recognized, the *Bivens* remedy itself would never have been devised, for one who has suffered a constitutional injury always could have recovered in tort.[94] Conversely, the Court has made clear that not every common-law wrong rises to the level of constitutional injury.[95] Since the rights of plaintiffs claiming con-

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[90] *Id.* at 20.

[91] *See* Public Citizen Litigation Group, Memorandum on Handling of Tort Claims Act Cases Under H.R. 2659 Where Event Gives Rise to Constitutional and Common-law Torts 3–5 (Oct. 19, 1979) (on file in office of HARV. J. ON LEGIS.).

[92] *See 1979 House Hearings*, *supra* note 2, at 123–24 (statement of George Bermann, Professor of Law, Columbia Univ. Law School).

[93] The elimination of such extra rights would not mean, however, the elimination of independent administrative action where constitutional injury had been demonstrated. Courts would still have to make the distinction between constitutional and nonconstitutional tort liability for the former triggers special disciplinary sanctions.

[94] *See Bivens*, 403 U.S. at 392 ("[T]he Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen.").

[95] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); *cf.* Ingraham v. Wright, 430 U.S. 651, 677–82 (1977) (due process does not mandate hearing where common-law damages are available for deprivation of liberty).

stitutional injuries differ significantly from the rights of plaintiffs claiming nonconstitutional injuries, and since the distinction between the two types of claims is itself valid, the distinction should be retained.

To be sure, when the facts of a case only arguably support claims of both constitutional and nonconstitutional injuries, it sometimes will be difficult to decide whether claims of both types of injuries, or of only one, should be allowed. If Congress affords the extra rights now available to *Bivens* plaintiffs to those who allege constitutional injuries in actions against the United States, without extending such extra rights to plaintiffs alleging nonconstitutional wrongs under the FTCA, one can expect attempts to take advantage of these rights by "skillful counsel [who] plead the existence of a constitutional tort when their case in reality sounds in a traditional, common law cause of action."[96] That counsel can be expected to do the most for their clients, however, does not justify curtailing substantive rights and remedies. There is no reason of course, for Congress not to make clear in the legislative history its intention that courts be alert to the possibility of such skillful pleading, and to decide a plaintiff's entitlement to the special advantages of pleading constitutional torts "based upon the true gravamen of the tort as alleged and proven,"[97] and not simply upon the label used by counsel to characterize the wrong.

IV. Conclusion

Congress should amend the Federal Tort Claims Act to provide that the United States shall be substituted as the exclusive party defendant in all civil damage actions for violations of rights secured by the Constitution of the United States committed by federal officials while acting within the scope of their office or employment. In amending the FTCA, Congress must ensure that its statutory remedy for violations of constitutional rights by federal officials is no less effective than the remedy fashioned by the Supreme Court in *Bivens* and its progeny.

To meet that standard, a legislative remedy should provide, among other things, that:

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[96] U.S. Dep't of Justice, Section-By-Section Analysis of S. 695, at 8 (1979) (on file in office of Harv. J. on Legis.).

[97] *Id.*

(1) In damage actions alleging constitutional violations, the United States may not assert as a defense any qualified immunity available to the official whose conduct gave rise to the claim, or his reasonable good-faith belief in the lawfulness of his conduct. Good-faith immunity of officials has been judicially created for policy reasons to ensure that officials exposed to personal liability shall not be discouraged from actively discharging their responsibilities. The policy basis for qualified immunity disappears when the government is substituted as the defendant. Allowing the United States to assert the official's qualified immunity in such circumstances would unjustifiably deny compensation to many victims of constitutional torts. It also would afford the government an advantage enjoyed neither by private nor public employers at common law, nor by the United States itself in nonconstitutional tort suits under the FTCA.

(2) An alternative system of administrative sanctions should be available to perform the deterrent and corrective functions now intended to be served by the damage remedy available in lawsuits against individual officials. At a minimum, Congress should provide every federal agency with explicit statutory authority to employ existing administrative controls and sanctions on officials who have violated the constitutional rights of any person. Congress should consider seriously the need for an independent administrative disciplinary mechanism as well as other measures believed necessary to strengthen administrative methods of dealing with official misconduct.

Legislation incorporating these two elements would go far toward satisfying the twin goals of ensuring adequate compensation for those whose constitutional rights have been violated, and deterring future violations of such rights by holding federal officials accountable for their misconduct. It is in large measure because the *Bivens* remedy has not satisfactorily served these goals that a legislative alternative to that remedy is necessary.

A decision by Congress to afford plaintiffs in constitutional tort suits in which the United States is the defendant the extra rights now available to *Bivens* plaintiffs—the right to jury trial and the right to punitive or additional damages—undoubtedly would be considered by the courts in determining whether the legislative remedy fashioned by Congress is an adequate substitute for those currently provided by *Bivens*. Whether attorney fees should be provided successful plaintiffs under the new

legislation, whether former officials, like sitting officials, should be made subject to administrative sanctions in exchange for being released from *Bivens* liability, whether the new legislation should reach action taken not only within the scope of an employee's office or employment, but under color of law, and whether the new legislation should preserve the distinction between constitutional and nonconstitutional torts—are issues that Congress must face in fashioning legislation that will replace the *Bivens* remedy. The Ninety-eighth Congress should meet the challenge of making the compromises necessary to enact such long overdue legislation.

Senator GRASSLEY. We will now hear from two witnesses, Mr. Bun Bray, executive director, accompanied by Mr. Andreas Evans, assistant executive director, Federal Managers' Association, as well as Mr. Jerry Shaw. And I assume that——

Mr. BRAY. Mr. Evans is not with us today.

Senator GRASSLEY. Mr. Evans cannot be here, so we have Mr. Bray and Mr. Shaw.

I want to thank you, and as I recall, we had some people from one or the other of your associations at our previous hearings that were here before. So I would like to have you summarize your statement.

STATEMENTS OF BUN BRAY, EXECUTIVE DIRECTOR, FEDERAL MANAGERS' ASSOCIATION; AND JERRY SHAW, GENERAL COUNSEL, SENIOR EXECUTIVE ASSOCIATION, AND CHAIRMAN, FEDERAL EMPLOYEES COORDINATING COMMITTEE

Mr. BRAY. Thank you, Mr. Chairman.

As executive director of the Federal Managers' Association, I represent some 16,000 Federal managers from all the major departments and agencies. They are spread across the country.

We certainly appreciate your continuing and positive interest in this subject. We did testify previously before you, and I am so very, very glad to see the kind of reception being given this morning and the type of witnesses.

My first interest, Mr. Chairman, in this subject was some 10 years ago. I, at that time, was staff director of the Manpower Subcommittee of the House of Representatives. I went up to Watervliet Arsenal and there the top civilian head of the arsenal said to me, "You know, Bun, I might be sued and lose everything I have some time or another." I said, "Why, Tom?" He said, "Well, I must certify to the reliability of every gun barrel," and most of the gun barrels for the free world were being manufactured at Watervliet. He said, "One of them can explode out at the firing range someplace and the survivors and/or the heirs could sue me and get everything that I have got."

I brought that back with me, and it excited a lot of people. Many of us never thought of it before.

The difference between FMA and a lot of the groups that have been testifying here and on the House side, where we were recently, is the fact that our members do not carry guns. We look at this issue a little bit differently from, maybe, the FBI and other security groups. It is the harassment of the supervisor or Federal employee, or one of the employees, or as the veterinarian here testified, from the West, a few minutes ago, the fear of making decisions.

For example, we have the head of personnel agencies in the Government being sued for half a million dollars because of alleged nonpromotion due to age. That is a type of situation that you have. And in fact, this whole issue is becoming so popular that now we have insurance companies all over town selling this insurance.

But I feel that the witness, the Commissioner from the Internal Revenue Service, did a beautiful job a few minutes ago, earlier, when he made this statement:

> We believe that this bill provides a proper balance to Government by eliminating personal liability without eliminating personal accountability, and in so doing protects the legitimate interests of citizens and employees alike.

I feel very strongly that we must not forget, Mr. Chairman, that our agencies, our departments have rules and regulations to take care of, to discipline the employee that is out of line. I have been in this business since 1946, working with and for Federal employees at various levels. I was in the Pentagon for years, then up here on the Hill, and now representing them for 11, 10 years. So that if an employee gets out of line, you can be assured that the agency has the full job of taking care of it.

I want to say again that I appreciate so much what you are doing, and we in FMA would like to see this particular legislation move forward. I think it will improve employee morale. Right now the typical Federal employee's morale is very, very low and this would be a wonderful move forward.

It can be a bipartisan approach, certainly; and it will help a lot and will certainly improve the service to the American people, and I think save the taxpayers money in the long haul, this legislation.

Thank you so much, Mr. Chairman, for having us here.

Senator GRASSLEY. You have a statement?

Mr. SHAW. Yes, sir, Mr. Chairman. I would like my statement introduced in the record, and I would just briefly summarize.

My name is Jerry Shaw. I am the general counsel of the Senior Executives Association, which represents career members of the Senior Executive Service and supergrade executives. I also chair the Federal Employees Coordinating Committee that is made up of 12 other Federal employee management organizations, including Federal Veterinarians, Patent Office Professional Association, Federal Engineers, Federal Bar Association, Professional Managers' Association, and others.

Mr. Chairman, after we testified here last year, we told our members in the Senior Executives Association that if we offered them insurance to protect against constitutional tort suits we would have failed. We would have failed helping to secure passage

of a bill which would provide them protection, and we would have felt like that failure reflected on our ability to get their viewpoint across.

Mr. Chairman, we failed miserably. We sold one heck of a lot of insurance. We do not make a penny off the insurance, but we sell it. The fact that Federal employees or executives must buy insurance out of their own pocket in order to perform their function and perform their duties, and feel secure in their home and in their family is a failure on behalf of not only our association but on behalf of the administration and the Congress and all the interested parties here.

It is appalling to us, and it has been for a number of years, that career Government employees and executives should be personally subjected to suit, to the potential loss of everything that they have worked for all their life, merely because someone, whether it be a subordinate employee, a taxpayer or some other individual, can seek to intimidate them in the performance of their job by filing a personal constitutional tort suit against them.

We feel very strongly that it is time that a bill be passed which would provide protection to these employees. We are well aware of the differences of opinion between some citizens groups and the Department of Justice concerning the good-faith defense. Frankly, we think that it is time for a compromise, if that is what it takes to get a bill passed.

There are three kinds of situations that arise: the first involves liquidated damages for any constitutional violation that happened to be done to a person; the second involving actual damages incurred because of that violation; and the third involving punitive damages for willful violations.

The recent Supreme Court decision involving a prison guard, which authorize punitive damages personally against Federal employees has again heightened the interest of Federal employees. Interest is the wrong word, heightened the fear of Federal employees.

It seems to us that all parties working together should be able to fashion a bill which would protect the taxpayers from a raid on their pocketbook by the liquidated damage provision or by punitive damage provisions and still preserve to the plaintiff recovery of damages that they should have. For example, if an individual was actually harmed, physically and mentally, then we believe that the normal tort principles that govern all the other nonconstitutional torts in this country, which is based on State law and which are tried before Federal judges, should prevail. We do not really understand why there should be any difference or distinction between the standard of liability for a constitutional tort or the standard of liability for an automobile tort; that is, a tort against a citizen involved in an automobile accident with a Government employee.

We do recognize that if punitive damages are sought against the United States or against the individual, that the good faith of the individual is obviously going to become an issue. And we think that the good-faith defense should be available to the United States in that kind of a situation. We are troubled by the kind of example that Assistant Attorney General McGrath used this morning on liquidated damages. It involved paying a person—who is walking through the jailhouse door because he was convicted of a crime—

for some technical violation of his constitutional rights, which we became aware of through a motion to suppress which was granted either in whole or in part by the court involved. I think that is something that would shock the conscience of most people.

There should be a class of cases, whether it be the $1 case or the no dollar case, where if it is a technical, constitutional violation, and there are no actual damages involved to the individual that no damages should be awarded even though there may be a violation of a constitutional right.

We do not believe that a jury trial is appropriate in these cases any more than we believe that a jury trial is appropriate in all the rest of the Federal Tort Claims Act cases which are tried by the thousands in this country every year. We think that Federal district court judges have particular expertise in dealing with tort suits against the Government. They are doing it now, and we do not see any reason why that should be changed.

We are preliminarily opposed to the awarding of attorneys fees in these cases, depending upon the potential for damages. We understand the provisions, or the argument that some of the organizations make that the damages would be so small that it would be necessary to award attorneys fees in order to protect the constitutional rights of individuals through lawsuits. If that is true, then we think that there should be some consideration given to attorney's fees provisions. However, if the damage potential is large enough a contingency fee basis would certainly be more appropriate.

Finally, Mr. Chairman, we want to leave the thought that we started with, we think that it is time to pass a bill. We are willing to work with any organization and we are willing to work with the Senate and the House in order to pass a bill which would provide protection to Federal employees. They literally are the scapegoats in the processes of the argument that has taken place between the administration and these various groups, and which has not enabled Congress to pass a bill. And it is time that they finally get relief.

Thank you, Mr. Chairman.

Senator GRASSLEY. In your desire to pass a bill, which you mentioned twice, I assume that you mean something that will accomplish some good as opposed to a hollow victory.

Mr. SHAW. Obviously, Mr. Chairman. Yes, sir. We think that the bill that I outlined to you would do that. We think that neither the House bill nor the Senate bill which you have before you, or S. 775 which you have introduced are that far apart.

Senator GRASSLEY. On page 3 of your testimony, Mr. Bray, you noted H.R. 595, and that it would in no way render Federal employees immune from prosecution for criminal acts. I wanted to note in regard to the point you just made, for the record, that title XIII of S. 829 as well as S. 775 also do not preclude criminal remedies.

Also, I would like to ask you, has the Federal Managers' Association looked into private insurance coverage for tort liability?

Mr. BRAY. Yes, we have, and many have come to us with proposals. It has become extremely popular, and we take the same atti-

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tude as Mr. Shaw, and that is that it is a sad situation that they have to take such insurance out.

In fact, one of the cases that I mentioned a few minutes ago, the personnel director, he pays $85 a year for something like half a million dollars worth of coverage. It has become very popular, and two or three—many insurance companies are going to go out and sell it widespread.

Senator GRASSLEY. To get back to a point that I asked Dr. Houle, the veterinarian from Montana, about where in his 20 years of service, you know, where he became aware of this potential liability and it started working in the thought process of employees.

So I would like to ask you whether or not you find employees are aware of the potential liability, or is it a case where they are not aware of it until a suit is actually brought against them or somebody they are closely associated with, or somebody they at least know about in a distant way.

Mr. BRAY. This is new. This concept is almost reaching widespread notice now across the country. But as I said earlier, when I came back from Watervliet, 12 years ago, people did not know about it. I have worked for years with Federal employees and we never thought about it.

But all of a sudden, and now people know about it and they are using it. Just recently a person was killed in a shipyard, and so the heirs of the employee are suing the various levels of management as well as the Navy for their own protection. So that it has become popular and will increase in popularity until we do something in the way of legislation.

And what I am worrying about is the fact that Dr. Houle made this very strong point, the fear of making a immediate decision but having to move it on up will reduce the kind of service that we should have for the American people, the public. And there are times when you need timely decisions and, of course, my mind goes out now to the man in the tower, in Houston, Tex., where they are having a tornado, for example, making a decision to move the plane in or out. What will we do about it?

So I represent those kind of people.

Mr. SHAW. Mr. Chairman, from our perspective, our people are very, very aware of the risk that they run. That is one of the reasons that they have begun buying this insurance in large droves. And the insurance premium, although low right now, is certainly going to increase as long as these suits increase. And they recognize that $85 a year is the beginning of a much larger investment they will have to make later in order to continue to get that protection. They are becoming more aware of it every time that the Court rules, for example, that they now can be found liable for punitive damages.

It is not a little noticed provision, it is one that shows peaks and valleys as one of their coworkers get sued, or a new suit filed. But they certainly are aware of it.

Mr. BRAY. Mr. Chairman, if we do not have the legislation soon, then you will find the situation spreading within our Government where the employee sues the supervisor, harasses the supervisor, and that is when we will really find morale problems and problems of service, getting the job done.

I think if we are just opening up with that, if we do not have legislation it will become a real problem.

Mr. SHAW. One point Mr. Bray made. I understand that some of the Federal employee unions were asked to testify by some agency heads, and the agency heads did not get a response. The Federal employee unions that I have talked to are kind of caught in a conflict because they represent employees who want to be able to sue their supervisors in order to get the supervisors off their backs sometimes, and at the same time they represent rank and file workers who are being sued by citizens for actions that they take. So they are in a very difficult situation. And while they do not oppose it, they do not want to come out publicly and support it either.

Mr. BRAY. Mr. Chairman, you do not run the Government with the fact that I can sue you, my supervisor, if I do not like your decision. We can not operate very long in that atmosphere. So I would hate to see that become prevalent in any way, but it could.

Senator GRASSLEY. The concluding question then, should we assume that both of your organizations are willing to forego the good-faith defense in order to get a bill passed?

Mr. SHAW. Yes, sir. Very reluctantly, I am. My organization is.

Mr. BRAY. Yes, sir.

Senator GRASSLEY. I want to thank both of you for your testimony. Once again you have been very cooperative.

Mr. BRAY. We sure appreciate your continuing interest.

[The prepared statements of Messrs. Bray and Shaw follow:]

PREPARED STATEMENT OF BUN B. BRAY, JR.

Mr. Chairman and members of the subcommittee, my name is Bun B. Bray, Executive Director of the Federal Managers Association. With me is our Assistant Executive Director, Mr. Andreas Evans. The Federal Managers Association is the oldest and largest management Association in the Federal Government. It is also diversified in terms of membership. FMA members range in grade level from supervisors in the Wage Grade schedule to managers in the General Schedule as high as supergrade. Chapters of FMA exist in most departments and agencies both civilian and defense. This legislation, S. 633, is of critical importance to all of these people. This problem has been growing at a dangerous rate and in our view is impacting on the ability of our managers to make decisions on significant responsibilities. It is most encouraging to see that this Committee shares our interest by your having scheduled these hearings.

Mr. Chairman, this problem developed following the Supreme Court decision in the *Bivens* vs *Six Unknown Named Agents* case in 1971. That decision exposed all Federal workers to personal suit for actions they take within the scope of their employment. Thus, their own personal funds are in jeopardy when a complaintant feels his/her Constitutional rights have been violated. Cases of this nature came to be known as *Biven's* suits.

While the number of these cases were small at first, they have been proliferating at an alarming rate in the last few years. When we testified before the Senate Judiciary Subcommittee on Agency Administration in 1981, the Justice Department reported slightly more than 1,500 suits were pending. Today that figure is more than 2,300, a staggering and dramatic increase. Because Constitutional Tort suits usually involve multiple defendants, estimates of the number of Federal employees facing these actions range as high as 20,000. It is no wonder that Dr. Donald J. Devine, Director of the Office of Personnel Management, in testimony last year said, "• • • the specter of lawsuits against agents of the Government in their personal capacities, for alleged violation of Constitutional rights, threatens the vitality of the Government."

Mr. Chairman, he was absolutely right. The knowledge of their exposure to personal liability has chilled managers' enthusiasm to take action in some of the most important areas of management such as personnel decisions on promotion, disci-

pline and assignment or tough program decisions. While there is considerable publicity accorded suits against the highest level of Federal officialdom, the real problem is in the day-to-day action levels of government. For example; a large number of the pending suits are based in one way or another on a personnel action by a supervisor. The problem has grown to such proportions, that some Federal employees at their own expense have even taken out insurance to protect their personal assets against "*Bivens* suits."

Since 1971, there have been 10,000 "*Bivens* suits" of which only a few have resulted in judgments for plaintiffs. One of these judgments was for only one dollar. It is obvious from this history of "*Bivens* suits," that violations of Constitutional rights by government employees are rare, and that many are frivolous. Former Attorney General, Griffin Bell once said that subjecting Federal employees to personal suit is not serving any interests. Under our present system, even the injured person is not properly served. Federal employees are rarely financially able to make whole an injured party. The size of most judgments for the plaintiff reflect the truth of that statement. If indeed a Constitutional right was violated, a collectible judgment of suitable size is unlikely. So, Mr. Chairman, even from the plaintiff's perspective, the Tort Claims Act needs amendment.

Then there is the cost in real dollars. The U.S. Justice Department estimates that defending "*Bivens* suits" are costing the U.S. taxpayers in excess of 6 million dollars per year. With expenditures by agency attorneys and other officials, the cost goes up to more than 10 million dollars. That's a lot of money to spend when real violations of Constitutional rights are found in so few cases. As our present system operates, the possibility of negotiating a settlement is slim because of the limited assets of the defendants.

By substituting the U.S. Government as the defendant in Constitutional Tort actions, we open the national fisc to make whole the victim of a Constitutional violation. We create a fair and equitable means of seeking redress in court for plaintiffs where none in real sense exists now.

Mr. Chairman, this issue has been haunting the Federal manager and supervisor for a long time, too long. It is a canker sore in the workplace of government from the Social Security local office through the atmosphere of a law enforcement operation to the industrial activities at a U.S. Naval shipyard. No Federal employee is safe from personal liability for the actions he/she may take in course of meeting the responsibility placed upon them by their job requirements.

Most Federal employees are unschooled in law and to them there is small comfort in being told that plaintiffs rarely prevail in "*Bivens* suits." After all, even the faint specter of financial ruin is frightening. The fear is not short lived—many of these suits have dragged on for years. In addition, under the adage of where there's smoke there's fire, an employee's reputation is a legitimate concern.

H.R. 595 would, in no way render Federal employees immune from prosecution for criminal acts. Indeed, such acts would be outside the scope of their employment and prosecutable under appropriate statutes. The Federal Managers Association would not support any legislation that would change that.

I referred to the comments of Dr. Donald Devine who earlier pointed out how the threat of personal suit "threatens the vitality of government". The vitality of government comes from the people charged with the day-to-day responsibility of the government workplace. These people are not robots or computers but men and women who work hard to pay for their car, their children's education or the othodontist bill for little Mary's braces. Most Federal employees' closest contact with courts have been for traffic violations or, at the most, disputes over minor claims. To find themsewlves named in a personal suit for a $100,000 is horrifying; more so because it stems from a conscientious line-of-duty action. In such a workplace, can you expect the Federal employee to make tough decisions? Can you expect the supervisor to take a personnel action when necessary, if he fears that it may get him sued except in the most blatantly obvious cases? Aren't we demanding infallibility of an employee; to back the actions of the people we tell to take the actions?

Mr. Chairman, this issue was brought to FMA's attention in 1976 by a top manager at Watervliet Arsenal in New York; we have been urging this legislation ever since. Both the Carter administration and the Reagan administration have supported amendments of this kind.

We know one Federal supervisor for whom this legislation is too late. In 1981 a supervisor returned emotionally distraught from giving a deposition in a "*Bivens* suit" against himself. Less than an hour after returning from that highly charged session, he clutched his chest and died of a heart attack. We cannot say with any certainty that the suit caused it, but we also can't be sure that it did not.

We appreciate this opportunity to participate in the legislative process and will be glad to answer any questions.

PREPARED STATEMENT OF JERRY SHAW

Mr. Chairman and members of the subcommittee: Good morning. My name is Jerry Shaw. I am General Counsel of the Senior Executive Association [SEA], a voluntary, professional organization that speaks on behalf of career members of the Senior Executive Service [SES] and supergrade executives.

I appreciate the opportunity to appear before this subcommittee to support title 13 of S. 829. Such legislation would be advantageous for all. A deserving plaintiff would have a liberalized basis for recovery from the United States. The Federal Government would benefit financially by no longer having to spend money to retain private counsel to represent Federal employees in certain suits, and by substantially reducing the amount of administrative and legal staff time utilized to assist employees and the Government in these cases. And Federal employees acting within the scope of their employment would no longer be subjected to the intimidation or harassment by lawsuits which could ruin them financially. It is this last part upon which we shall concentrate.

The Federal executive today is beset by numerous obstacles in performing effectively the work of the public service. We have appeared before several other committees of both Houses on a host of issues that impinge on the daily management of the Government's programs. Yet, we know of no issue which strikes more viciously at the morale of Federal managers and executives than the knowledge that they may be personally sued for actions performed within the scope of their employment. Those suits may be as serious as violations alleged in areas where the law is unclear, or they may be trivial as allegations solely for the purpose of harassing a public manager. The fact that many thousands of goverment employees have been defendants in constitutional tort actions since 1971 and only a handful have ended in money judgments against the individual employee defendant suggests that most cases are marked by such trivial qualities. The knowledge that your employer, the Government, may have to disassociate itself from assisting you can considerably alter the enthusiasm one has for management.

There are those who argue that such threats are necessary to produce a chilling effect on the arbitrariness of otherwise unchecked Government administrators. We suggest that the evidence of such arbitrariness is extremely rare, that other administrative procedures exist to correct and punish such caprice and that the present laws result not in prudent management but in supine Federal administration whenever the law is unclear or subject to interpretation. As you are aware, Congress expects that agencies be ruled by its intent as well as by its laws. Such opportunity for interpretation produces areas of uncertainty that still require executives to act.

We reject any suggestion that the possibility of suit against individual Federal employees personally is necessary or desirable as a guard against improper action by Federal employees. We know, for example, of no evidence that drivers of Federal vehicles have become more accident-prone since they received statutory immunity in 1961, or that various categories of federally employed medical personnel became less dedicated or less able after various statutes passed in 1965, 1970, and 1976 provided immunity to them.

There are adequate existing controls on the acts of Federal employees, without needing the threat of a personal lawsuit. We believe that to almost all Federal employees the accountability to supervisors which governs assignments, evaluation and promotion is the most direct type of control. In addition, we cannot over-emphasize the fact that the activity of the many Federal employees for whom we speak is governed by their respective codes of professional conduct and their general professionalism and ethics. It must also be remembered that although the proposed legislation would immunize the individual, a lawsuit against the United States based upon an employee's conduct would nevertheless directly bring into question the activity of that individual. Such a lawsuit would thus involve the reputation of the employee whose conduct was questioned.

The necessity for this legislation cannot be played down by rhetoric. The proposal is not in any way an over-reaction. At present, approximately 2,200 lawsuits are pending against Federal officials in their individual capacities, 75 percent of these lawsuits involve multiple defendants, some as many as 30 or 40. Between 7,500 to 10,000 Government employees are involved. The issue that should be addressed is whether thousands of Federal employees and their families should be put through the ordeal of suit, the accompanying worry and the possibility of financial ruin so

that the rare Federal employee who, in the minds of some, may deserve to pay personally with not escape. We submit that this is far too high a price to pay. We have been informally advised that in some agencies there has been a 20-percent increase in such suits within the past year.

We are aware of the differences of opinions between some citizen groups and the United States on the good-faith defense. The very recent Supreme Court decision concerning the imposition of punitive damages on a prison guard has again heightened the concern of many Federal employees about their individual exposure to lawsuits. We seriously wonder if a compromise position on the good-faith defense would not be in the best interests of the Government and the citizen groups.

The other extreme is when an employee or the Government might be liable for punitive or compensatory as well as actual damages. Obviously in that kind of situation the Government would have to raise as a defense the good-faith of the employee and the good-faith of the Government in seeking to defend its actions. So it is absolutely necessary that the good-faith defense be available in those cases.

The middle ground then concerns violations of an individual's constitutional rights which are of a serious nature, and which cause actual damage. One manner of dealing with this might be by allowing a plaintiff to prove that negligence of the Government through its employees was the cause of his or her actual damages, and thus collect the actual damages which the individual incurred. This would rule out the liquidated damages provision presently in the bill, and would minimize the number of suits brought. It might be possible, however, to establish a guideline for the courts in determining what the actual damages might be for violation of a constitutional right which actually damaged a citizen's physical and mental well-being, or reputation in the community, etc.

We make these recommendations not in the belief that the Government or citizen organizations' positions are either right or wrong, but merely in the hope that a compromise can be reached which would allow passage of this legislation and provide protection to Government employees. We recognize that some are concerned that the failure of the Government to assert the good-faith defense would prejudice an employee's rights in subsequent disciplinary proceedings. We share that fear. We would, therefore, request that unless the good-faith defense is retained in all cases by the government, that a specific provision be added to the bill which would clearly state that any finding in a constitutional tort case against the Government could not be used for the purpose of determining what action should or should not be taken against a government employee, nor would there be any presumption that a finding on behalf of a plaintiff against the Government meant that an employee had in any way done anything wrong or failed to properly perform his or her duties.

We oppose any provisions which would provide for a jury trial. This is especially true if our proposals concerning the good faith are adopted, since the same standard would be applied in most constitutional tort cases as in other tort cases involving the Federal Government. We believe that ordinary tort concepts of negligence in State laws should prevail on determining whether or not negligence was present in constitutional tort cases, the same as in other tort cases under the Federal Tort Claims Act. We believe that these cases should be tried before Federal district court judges, not before juries.

As we have previously testified, we oppose the awarding of attorney's fees in these cases.

We also favor the elimination of most of § 2680 exceptions in constitutional tort cases. The suggested amendment protects federal employees from the possibility that a court would permit a suit against an individual employee if the suit against the U.S. were barred by one of those exceptions.

In closing, the career senior executives of the U.S. Government have, in our estimation, provided the American people a caliber of administration that is and should be the envy of any government in the world. They take seriously the charge of administering the laws of this land as equitably and efficiently as possible. They bring to those jobs enormous training and experience and the reputations of a lifetime of public service. They entered the profession of senior executive in part in hope that at long last they would be accorded the visibility and respect that their performance merited. But they live each day with the denigration of their worth—whether it be in limitations on pay, or in exposure to possible suits for actions performed within the scope of their employment. One does not have to look far to find evidence that even the most dedicated public employees are finding such conditions intolerable. This bill is really one very essential piece of a larger set of legislation needed to restore the effectiveness and morale of the public employees on which you depend to implement the laws you pass.

I shall be pleased to answer any questions the subcommittee may have.

Senator GRASSLEY. On our last panel, the final testimony, we will hear from three distinguished organizations, the Federal Law Enforcement Officers Association; the Society of Former Special Agents, FBI; and the National Law Enforcement Counsel.

I would like to proceed according to the witness list, the way that we have them labeled here.

I would also like to just note for the record that this panel utilizes the bill number S. 775, which is a bill I introduced in this Congress and a bill which is virtually identical to that in S. 829.

I would ask you to proceed in the way that you are listed on the schedule, and also, for the purposes of the record, identify yourself together with your organization.

So I would ask Mr. Burden to start.

STATEMENTS OF ORDWAY P. BURDEN, CHAIRMAN, ACCOMPANIED BY DONALD BALDWIN, EXECUTIVE DIRECTOR, NATIONAL LAW ENFORCEMENT COUNCIL; WILLIAM V. CLEVELAND, ACCOMPANIED BY WILLIAM A. BRANIGAN, SOCIETY OF FORMER SPECIAL AGENTS, FBI; AND JACK B. SOLERWITZ, GENERAL COUNSEL, FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION

Mr. BURDEN. Mr. Chairman, I would just like to highlight certain points from my written testimony.

My name is Ordway Burden. I am the founder and chairman of the National Law Enforcement Council. It is an umbrella organization and conference group for 12 law enforcement membership associations representing over 300,000 law enforcement officers throughout the Nation. I would like to list our member organizations: Federal Criminal Investigators Association, Law Enforcement Assistance Foundation, Victims' Assistance Legal Organization, Society of Former Special Agents of the FBI, Association of Federal Investigators, International Union of Police Associations, Fraternal Order of Police, National Troopers Coalition, Virginia Sheriffs Association, National Association of Police Organizations, National District Attorneys Association, and the FBI National Academy Associates. I have listed all the member organizations individually to point out the diversity of our membership.

The tort claims issue has been our major legislative concern since our founding. Despite the fact that only a minority of our membership represents Federal law enforcement, we feel this issue is crucial and this issue is of vital concern to the national law enforcement community. We have heard from earlier witnesses today about the huge volume of frivolous lawsuits and the harassment process that Federal agents have been forced to undergo. Our membership is concerned and law enforcement nationally is concerned about the morale impact and the efficiency impact on Federal agents, investigators, and enforcement personnel. These men are under tremendous pressure which must cease.

Several of our council members have been sued for millions of dollars apiece. We feel that the good-faith provision contained in this legislation is essential. Without this language, the Tort Claims Act will continue to provide too much business for the lawyers, take up the time of the courts already overcrowded, and cost the

taxpayers millions in unnecessary expense. The good-faith provision is a needed amendment to the Tort Claims Act because it will insulate Federal law enforcement officers from fear of personal liability for enforcement actions taken in good faith, making them more willing to do their job. It will prevent so-called aggrieved parties from effecting frivolous and spurious harassment-type claims. It will give parties who are truly aggrieved, in those rare cases when agents are acting in bad faith, a collectible source of redress.

Without the protection of the good-faith provision, our member organizations feel that this bill becomes meaningless for law enforcement and criminal investigation personnel.

I appreciate the opportunity to make these comments.

Senator GRASSLEY. Thank you.

Mr. Cleveland, once again we meet. Just 2 weeks ago we were together.

Mr. CLEVELAND. Yes, sir.

Mr. Chairman, the Society of Former Special Agents of the FBI strongly supports remedial action proposed in S. 775. We feel that it is urgent that action be taken in this session of Congress to correct inequities that have resulted from *Bivens*-type cases since 1971. The Justice Department has estimated that cases currently pending involves 7,500 to 10,000 Government employees.

In January 1983, Alan and Margaret McSurely were awarded $1.6 million in connection with a raid conducted over 15 years ago; $218,260 was assessed against the estate of former Senator John McClellan whose Senate subcommittee was investigating the causes of urban disorders in the mid-1960's. The estates of two former Senate aides were assessed nearly $190,000.

As an outgrowth of that case, the McSurelys are presently suing George W. Hutchison, a retired FBI agent, for $350,000. When a deposition was taken from Special Agent Hutchison, he got the impression that they were probing for the names of additional agents who may have investigated the McSurelys so they could sue them as well. Incidentally, Hutchison's crime was that he coordinated the report on the McSurelys. He conducted none of the investigation.

Another case currently pending appeal is *Hobson* v. *Wilson*, relating to FBI counterintelligence programs initiated in the late 1960's. This case started in 1976. In December 1981 plaintiffs were awarded damages in the amount of $252,500 against four former special agents of the FBI and one current special agent. In the same case, attorneys fees in the amount of $500,000 have been requested.

There is pending in the Southern District of Texas a suit by Frank and Belinda Lugo against Joseph E. O'Connell, former special agent in charge of the San Antonio office until his retirement in 1978. This suit seeks compensatory damages in the amount of $5 million and punitive damages in the amount of $10 million. Mr. O'Connell says he retired 3 months after the investigation was started, never directly supervised the case and recalls very little about the case.

A 30-year veteran of the Forest Service supervised the removal of garbage and scrap metal from a mining site in the good-faith belief he was doing his job. Two years later he was sued for $48,000 in

compensatory damages and $100,000 in punitive damages. Three years later the court awarded the plaintiff $1,000 in compensatory damages plus $216.50 in court costs. The case was appealed.

The forest ranger subsequently testified before a Senate committee that the lawsuit had an effect on his ability to make independent decisions:

> The unsettled suit has been an ominous cloud over my personal and financial situation for over 8 years. Even worse than the possible financial damage, is the uneasy feeling I get each time that I make a decision * * * (See Congressional Record March 1, 1983, S1874).

Judge William H. Webster, Director of the FBI, testified on February 4, 1982:

> My problem today is not unleashing the FBI; my problem is convincing those in the FBI that they can work up to the level of our authority. Too many people have been sued, too many people have been harassed and their families and life savings tied up in litigation and the threat of prosecution. So that we and others like us run the risk that we will not do our full duty in order to protect our individual selves.

Mr. Chairman, attached is a "Position Statement" supported by the 8,000 members of the Society of Former Special Agents of the FBI, urging that bills amending the Federal Tort Claims Act be passed at the earliest possible time.

Also attached is a list of organizations which support the passage of S. 775. Although the list does not purport to be all inclusive, it represents better than 90 percent of all law enforcement and intelligence organizations as well as representatives of large segments of Government employees.

[The following was received for the record:]

SOCIETY OF FORMER SPECIAL AGENTS OF THE
FEDERAL BUREAU OF INVESTIGATION, INC.,
Long Island City, N.Y.

POSITION STATEMENT—PROPOSED AMENDMENTS TO THE FEDERAL TORT CLAIMS ACT

The Society of Former Special Agents of the FBI is concerned about a situation that is unjust to current and former Special Agents of the FBI as well as other government employees.

The Supreme Court ruled in 1971 in *Bivens* vs. *Six Unknown Narcotics Agents* that a person who feels wronged by the government can personally sue the government employee. This means that federal workers can be held personally liable for money damages for acts taken while attempting to perform their duty.

Since 1971, thousands of government employees have been taken to court and there are presently cases involving some 10,000 public servants. In December 1981 one present and four former FBI Agents were held liable for $262,500 for alleged violations of First Amendment rights relating to FBI counterintelligence programs initiated in the late 1960's and 1970's. This, plus some $500,000 in attorney fees being claimed by the prosecution, could cause financial ruin for the five individuals.

The Society of Former Special Agents of the FBI is seriously concerned about this and other cases pending like it. They have a chilling effect on current FBI Agents, causing them to hesitate to take appropriate action for fear it might subject them to personal liability.

There are bills pending in both houses of Congress which would make the government, not the employee, the defendant in Bivens type cases. The Justice Department has indicated that of the thousands of suits filed since 1971, a large percentage seem to be of a personally vindictive nature. Removing the employee as a defendant will destroy the motive for filing vindictive suits. The bills pending do not remove a citizen's legal recourse if wronged by the government, but simply substitute the government as defendant.

At the request of the Board of Directors and on behalf of the 8000 members of the Society of Former Special Agents of the FBI, I urgently recommend that bills amending the Federal Tort Claims Act be passed at the earliest possible time, thus

protecting government employees from personal liability when they are acting within the scope of their employment. For those who violate their public trust, discharge or discipline is the appropriate penalty.

No other group of employees is personally exposed to the danger of financial ruin, because private sector employers are jointly liable for actions taken by FBI agents and other Government employees the same protection that our fellow citizens have.

Respectfully submitted for the Society,

LEE O. TEAGUE, *President*

ORGANIZATIONS WHICH SUPPORT PASSAGE OF H.R. 595 AND S. 775

American Bar Association—Standing Committee on Law and National Security.
American Security Council.
American Society for Industrial Security.
Armed Forces Electronics and Communications Association.
Association of Federal Investigators.
Association of Former Intelligence Officers.
Association of Former Secret Service Agents.
Central Intelligence Agency Retirees' Association.
Consortium for the Study of Intelligence.
FBI National Academy Association.
FBI Agents Association.
Federal Criminal Investigators Association.
Federal Executive and Professional Association.
Federal Managers' Association.
Federal Physicians' Association.
Fraternal Order of Police.
Hale Foundation.
Interagency Law Enforcement and Intelligence Organization.
International Association of Chiefs of Police.
International Union of Police Association.
Law Enforcement Assistance Foundation.
National Association of Federal Veterinarians.
National Association of Police Organizations.
National District Attorneys' Association.
National Intelligence Study Center.
National Law Enforcement Council.
National Military Intelligence Association.
National Strategy Information Center, Inc.
National Troopers' Coalition.
Olmstead Foundation.
Security and Intelligence Fund.
Senior Executives' Association.
Society of Former Special Agents of the FBI.
Victims' Assistance Legal Organization.

Senator GRASSLEY. Mr. Branigan, is there anything that you want to add before I go on to Mr. Solerwitz?

Mr. BRANIGAN. I concur in the remarks of my colleague.

Senator GRASSLEY. Mr. Baldwin, I forgot to ask you.

Mr. BALDWIN. No, Mr. Chairman. The only thing I would ask is that——

Senator GRASSLEY. You are with Mr. Burden?

Mr. BALDWIN. Yes. Mr. Chairman, the only thing that I would ask is that our testimony be included in its entirety as if read. Mr. Burden did highlight it.

Also, with the chairman's permission, I would like to submit for the record the statement of one of our members who could not be here, the president of the Association of Federal Investigators, Mr. Lawrence A. Cresce. He asked that his statement be submitted for the record, with your permission.

Senator GRASSLEY. That will be included in the record.

Mr. BALDWIN. I would just add that the reason that we feel very strongly that this statement be included is that the former president of the Association of Federal Investigators is currently under suit filed in the U.S. district court on April 12, 1982, for $52 million, and there are other suits pending against the members of the Association of Federal Investigators.

Senator GRASSLEY. Mr. Solerwitz?

Mr. SOLERWITZ. Thank you very much, Senator, for inviting me here today.

I represent a group of only about 6,000 Federal agents. I have been representing them and their predecessor associations for about 15 years. They are mostly the 1811 group. We have criminal investigators represented from practically every agency, and although we only have 6,000 out of a potential 20,000 members, I think the experiences we have had in the last 15 years, really more perhaps than anyone else who has testified here today, touch up the pragmatic problems that exist.

Our membership is composed mostly of FBI, Secret Service, IRS intelligence agents, et cetera.

Over the years I have found myself in a position where I am the one who has carried the brunt of representing these individual agents. In other words, when these agents get sued and the Federal Government chooses not to represent them or the Justice Department makes a judgment that for whatever reason they cannot furnish the representation, it winds up at FLEOA's door, then in my office.

Through the heartache and tragedies that I have witnessed over the last 15 years, it is apparent that this legislation is absolutely essential.

Some of the cases that I have handled involved over 100 agents sued by the Weathermen faction in 1976. These agents were subpenaed to two grand juries, one in Washington and one in New York. They were sued civilly by these Weathermen and they were also disciplined administratively.

As a result, especially in the FBI case, of the panic that ensued after the epidemic of having so many people sued at once, people who are even in unrelated areas, not concerned with the Weathermen case, would come to my office—of course I do not want to mention any names, but FBI agents would come to my office who had 25 or 30 years of service and ask me if it were necessary to transfer their homes or divest themselves of bank accounts for fear of a trend of being sued at this point, even though they were in other areas.

A very famous case that involved testimony before another Senate subcommittee—House committee, God rest his soul, Congressman Rosenthal's committee, involved Dick Jaffe, who was a special agent with IRS, who was involved in the very famous situation of having opened a Bahama's banker's briefcase and gotten 300 names of people who had offshore secret bank accounts.

Dick Jaffe, to this day—and it is 12 years later—does not know if he is a hero or a villain as a result of that incident. As the criminal and civil prosecutions go to the various appeals levels, one day he is a hero, one day he is a goat; one day he is bankrupt, and one day

his assets are still his because of the change in the court decisions concerning whether that seizure of evidence was legal or illegal.

What I am happy to report to you, Senator, what we have had to do over the years in proper cases was counter sue, and we just had a recent success in New York before Judge Platt in the Eastern District of New York, where an FBI agent in New York was given an $85,000 judgment including punitive damages and treble damages against a plaintiff who had sued him without probable cause and in a malicious way. But even countersuits are not enough protection.

This lawsuit—this legislation is something that we have prayed for for many years, and we wholeheartedly support it. In fact, I find myself in a peculiar position, not being a Government person, of really having to look out for the rights of the agents more so than the Government and based upon the needs of the agents, we would wholeheartedly endorse the bill as it is with the affirmative defense. But if you were to ask me the question that you have asked everyone, I would have to answer to you that we would wholeheartedly support it even without the good-faith defense, because the legislation is so desperately needed now.

We feel that the good faith defense will come out eventually anyway, and certainly through various administrative or disciplinary procedures, the MSPB, et cetera, the agency has the remedy against the particular agent who acts improperly.

Thank you very much, sir.

Senator GRASSLEY. Yes. I appreciate all your testimony. Just a few questions.

Let me ask whether or not any of you have been sued personally.

Mr. CLEVELAND. [Raising hand.]

Senator GRASSLEY. You have?

Mr. CLEVELAND. Yes, sir.

Senator GRASSLEY. Mr. Cleveland, you are the only one.

Why don't you tell us what that did to you in your exercising your official duties?

Mr. CLEVELAND. Yes. This suit started even before I retired from the FBI in 1976. It involved a sum of $10 million. And I must say, Senator, that had it been $10,000 I would not have been able to sleep nights; but $10 million, I do not know what it is. So it did not bother me to that extent, and still does not, really.

The case has been written up in books. Fred Graham, CBS legal announcer, television, wrote a book in which he cited the case that I was involved in. The plaintiff appeared before a Senate subcommittee looking into the problem of relocating witnesses. I have not asked recently, but I hope the case is over and done with.

Senator GRASSLEY. I would like to ask the three groups here your views on whether or not it is reasonable to leave disciplinary functions within the individual agencies.

Mr. CLEVELAND. I would like to answer that if I may.

I certainly think that disciplinary functions by the heads of agencies is a proper place for them to be, and to allow a so-called aggrieved citizen to initiate and participate in disciplinary action, I think is entirely unwarranted.

At one time the bill, I believe, carried such a provision and it would have allowed them to reopen the case, I believe, even after it

had been completed if they were not satisfied with the disciplinary action meted out by the head of the agency.

I think Mr. Hoover and his successors have a pretty good track record of meting out prompt and fair, firm but fair, Mr. Hoover used to call it, disciplinary action. And I think that applies to Judge Webster as well.

Senator GRASSLEY. Mr. Burden?

Mr. BURDEN. Our organization represents both management and labor, and we feel very strongly that internal discipline must remain internal in the best tradition of professional administration.

Mr. SOLERWITZ. It has been my experience that, certainly I agree it should remain within the agency. However, there seems to be a built-in safeguard, and that is that for anything other than minor infractions, we have the Merit Systems Protection Board, which I spend half of my life at, and it seems to be a good overseer of the agency's disciplinary action.

Senator GRASSLEY. Does an agent's potential personal liability act as a deterrent to the commission of a tort on his or her part?

Mr. BRANIGAN. Most certainly the fact, what we are talking about here, Senator, is the chilling effect, and there is no question about that chilling effect insofar as the special agents of the FBI. In my time, and I spent——

Senator GRASSLEY. You are talking about a chilling impact upon the work that they have to do?

Mr. BRANIGAN. Right.

Senator GRASSLEY. OK. I guess I was coming at it from the other side. Does the potential of this, entering into their thought processes as they do their day-to-day work the threat of a suit keep them from committing a tort, committing a violation of people's constitutional rights?

Mr. BRANIGAN. I would not think this would have anything to do with it. I mean the individual, he is doing his duty. The only thing that I can see about the threat of a suit would be that he would not be doing——

Senator GRASSLEY. You know the point you raise is very important, and we take that into consideration. And I think we have established the point you are making, that it probably does affect their day-to-day work, whether or not they can perform up to par if they have these threats hanging over their head.

On the other side of the coin, though, is a feeling on some people's parts that the possibility of suit has got to be there as a way of moderating anything excessive that they might do. I guess what I would like to know is the extent to which people go about their day-to-day duties, do they stop to think in terms of, I better not do that, I will be sued for it.

Mr. SOLERWITZ. I think the threat, Senator, if I may, I think the threat is more disciplinary than it is the thought of being sued. The thought of being sued, of course, is a factor, but I think the greater fear is of being brought up on charges, and I do not think that the deterrent of being sued is as great a deterrent as the deterrent of the enormous disciplinary regulations and procedures that they have in every agency.

The answer I give you, sir, is based on daily working with them, on a daily basis. We get at least 30 to 40 cases a week involving disciplinaries, and I submit to you that it is less because of the fear of a civil suit than it is of losing their job.

Senator GRASSLEY. That is an important point.

Mr. Burden, or Mr. Baldwin, do you have anything in response to that?

Mr. BURDEN. I would just like to express the appreciation of the law enforcement community for your work in sponsoring this legislation.

Senator GRASSLEY. Thank you. I have no further questions.

I do have a final statement that I want to make for the record.

Mr. BALDWIN. Could I make one statement? I was anticipating your asking us the question you have asked the other witnesses of the panel as to whether or not we would support a bill if it did not have a good-faith provision in it. I think that the three gentlemen here will respond that we would not support the bill. We support the position taken by Judge Webster and other members of the administration. I quote the author of a number of books on victims and a member of the President's Task Force on Victims of Crime, a member of the Attorney General's Task Force on Violent Crime, Mr. Frank Carrington. He was asked this question, and he put it in writing both to the Attorney General and to members of this committee in previous years.

He said, "By giving you good-faith defense, the U.S. Government is literally begging people to sue it every time an agent makes a mistake of law."

I think you have seen an illustration today where persons who have vested interests; that is attorneys, very clearly do not want to give up the good-faith defense because, of course, it would make it much more difficult for them to take cases into the court; and whether it is the Government who is the defendant or the individual agent, it is going to cost a lot of time and money for both the Federal agents and the Government lawyers.

Senator GRASSLEY. Now, you took just a little bit different view on whether or not you would settle for a bill short of that.

Mr. SOLERWITZ. I am not going to make myself very popular by saying this, but we, of course, absolutely would support a bill without the good-faith defense, because we feel it is essential for the protection of all members.

Senator GRASSLEY. On the other hand, if a bill had a good-faith defense in it, you are not going to argue about that?

Mr. SOLERWITZ. No. The optimum would be the good-faith defense. But if you are asking us if we would support a bill without it, wholeheartedly, yes.

Senator GRASSLEY. So, Mr. Baldwin, your statement is for everybody to your right?

Mr. BALDWIN. That is our feeling, that we would not support a bill unless it had good faith, because there would be virtually no bill.

Senator GRASSLEY. Mr. Cleveland?

Mr. CLEVELAND. The Society of Former Special Agents, FBI, is, of course, behind Judge Webster's testimony this morning, and the Assistant Attorney General, calling for the good faith.

Senator GRASSLEY. Let me assure you that I appreciate here you offering that information, and I should have asked you as I asked everybody else as well.

I want to thank you as an individual panel very much. And you can leave if you want to. I have just a short statement I want to make.

[The prepared statements of Messrs. Burden and Solerwitz and submission of Mr. Baldwin follow:]

PREPARED STATEMENT OF ORDWAY P. BURDEN

Mr. Chairman my name is Ordway P. Burden. I am a private citizen whose lifetime interest has been in the field of law enforcement. I am a resident of New York City with a residence at 250 East 87th Street. I also maintain a residence here. The office for the National Law Enforcement Council is located at 1140 Connecticut Avenue, N. W. I am accompanied by Donald Baldwin, the executive director of the Council.

I am founder and President of the Law Enforcement Assistance Foundation, and Chairman of the National Law Enforcement Council, an umbrella organization for twelve law enforcement groups making up some 90 percent of the national law enforcement membership represented by national organizations. Over 300,000 law enforcement officers are represented by the twelve member organizations of the Council.

Members of the Council are: Federal Criminal Investigators Association, Law Enforcement Assistance Foundation, Victims' Assistance Legal Organization, Society of Former Special Agents of the F.B.I., Association of Federal Investigators, International Union of Police Associations, Fraternal Order of Police, National Troopers Coalition, Virginia Sheriffs Association, National Association of Police Organizations, National District Attorneys Association, and the F.B.I. National Academy Associates.

Our Council, and the individual members, is keenly interested in seeing that this important legislation sponsored by Senator Charles Grassley, S 775, becomes law. These amendments to the Tort-Claims Act are necessary to protect the law enforcement and investigative personnel against undue harassment from the vast number of suits filed against them. The Justice Department I understand has testified that there are some 3,000 suits pending against federal investigators and law enforcement personnel. There have been over 10,000 cases filed. Officials of the court system have testified in previous hearings before your subcommittee in past years that over 85 percent of these cases are frivolous and take the valuable time of the courts and consume an inordinate amount of time of government officials involved in the suits.

I will defer to other members of the Council to give you their personal experiences of frivolous suits brought against law enforcement officers. Several Council members have been sued for doing their job in what they consider their best for the taxpayers of this country, their employers.

Senator Grassley's bill does contain language on page 3 lines 12 through 15 that will help eliminate the vast number of the costly harassment-type law suits that end up being thrown out of court as unfounded. The "good faith" provision contained on page 3 of the bill makes this bill meaningful. Without this language the Tort-Claims Act will continue to provide too much business for the lawyers, take up the time of the courts already overcrowded, and cost the taxpayers millions of unnecessary expense.

This is a good bill. By writing into the language of S 775 protection for the investigator/law enforcement personnel we will be encouraging rather than discouraging better law enforcement.

The "good faith" provision of S 775 is a needed amendment to the Tort-Claims Act because:

1) It will insulate federal law enforcement officers from fear of personal liability for enforcement actions taken in good faith, making them more willing to do their job.
2) It will prevent so-called "aggrieved" parties from perfecting frivolous and spurious harassment-type claims.
3) It will give parties who are truly aggrieved, i.e., in those rare cases when agents are acting in bad faith, a collectible source of redress: the Government.

It is for these reasons that I think this bill should be favorably reported from your subcommittee and enacted into law. Without the protection of the good faith provision, however, this bill becomes meaningless for the law enforcement and criminal investigation personnel.

I appreciate the opportunity to make these comments before your subcommittee on this important bill.

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Prepared Statement of Lawrence A. Cresce

Submitted by Donald Baldwin

Mr. Chairman,

On behalf of the Association of Federal Investigators, I welcome this opportunity to comment on S. 775.

This bill is of utmost concern, not only to the Federal law enforcement community, but to all Federal officials making decisions involving personnel in and out of Government.

In 29 years as a Federal investigator, with the last three as the Assistant Inspector General for Investigations in the Office of Inspector General, Department of Transportation, I have observed first hand the need for revision of the Federal Tort Claims Act.

I have friends and colleagues who, having dedicated their lives to fulfilling their sworn obligation to defend and support the Constitution of the United States, have had to protect themselves and their reputations against law suits, involving Constitutional torts, many of which have proven to be without substance and are vindictive in nature.

The current Vice President of the Association of Federal Investigators was named as a defendant in a suit filed in a United States district court on April 12, 1982. He and three other individuals were sued for over $52 million, both individually and in their capacities as Government officials. There are two similar suits pending in my agency against investigators and auditors as well as the Inspector General and the former Secretary of Transportation. One of the plaintiffs was recently convicted for fraud against the Government; the other is awaiting arraignment on similar charges.

It is not my intention to dwell on the merits of these

suits, but I do believe that some of the implications and ramifications deserve comment. Under our present system, anyone can charge that he/she has been injured by the actions of certain officials and lay claim for damages. The complainant can make statements specifying certain actions on the part of the defendants for which the "aggrieved party" is seeking remuneration. The greater the amount of compensatory or punitive damages, the more likely the charges will receive media attention.

The defending officials are often precluded from responding to inquiries from the media regarding such charges because of various restrictions, including the Privacy Act. In effect, the charges are aired, sometimes sensationally, while the defendants must quietly go about defending themselves for actions they took in performing their official duties.

In cases where the plaintiff is a Government employee, such suits may be filed against Government officials, even though there are other appeal rights to which he may or may not have availed himself. Most agencies will have a grievance process in which a grievance examiner will present his findings to an independent deciding official. Should the deciding official uphold the agency, the employee may request the Office of the Special Counsel to conduct an independent review if the complaint pertains to a personnel action. Again, should the Office of the Special Counsel fail to uphold the employee's position and the agency decides to take an adverse action, the employee may appeal to the Merit Systems Protection Board.

An employee who feels he has been wronged may institute suit at any point, regardless of the merits. Response to such action is often burdensome to the officials involved, their general counsel and the United States Attorney's office. Since most components within the Federal Government are not geared

toward this type of activity, it will force significant distraction from assigned duties. In the case of vexatious or nuisance suits, this represents a gross waste of Federal funds and human energy that should be spent on more worthwhile projects.

The mere threat of being "named" in such a suit will deter many officials from taking decisive, required actions. They will look for an easier way out. Vacillation, delay, ineffective decisions and permissiveness result. Such attitudes do not go unnoticed in the workforce. Malcontents will take advantage of the resultant laxity. It will also adversely affect the morale of the other employees who strive to do what is necessary and proper, and yet see a certain few of their peers "manipulating" the system.

I would like now to focus briefly on the Federal investigator. Most of the Bivens type cases involved law enforcement officers alleged to having committed Constitutional torts. Of the thousand or so cases filed to date, there have been only a handful of adverse judgments, several of which are under appeal.

I think we can arrive at two conclusions from these statistics: First, the vast majority of investigators perform their duties in a competent, legal manner and are loyal to their oath to defend and support the Constitution of the United States. Secondly, a vast majority of suits are unsupportable.

In most of those instances where an aggrieved party is seeking redress, I think you will find that the injury, if there indeed was one, was not one of willful intent on the part of the investigator, but was simply an error of omission or commission, in which case the United States Government is truly the responsible party for having failed to properly train and supervise its agent. The AFI, by working closely with various investigative bodies, hopes to provide the necessary guidance and

training to eliminate such instances or, failing this, to keep them at an absolute minimum.

It is with this background that the Association of Federal Investigators supports the goals of S. 775. We do recommend, however, that certain amendments be considered. We believe that the "good faith" defense should be retained and not waived. Should the United States substitute itself as the defendant, we believe that it is entitled to the attendant defense otherwise available to its employees.

Mr. Chairman, if S. 775, with the above modifications, is enacted, it would reaffirm to all Federal investigators that the United States Government expects them to perform their duty in a proper and forthright manner, and that it is willing to stand behind them while they are acting within the scope of their employment. It would also remove the chilling effect that potential personal liability has on supervisors and program managers to take appropriate adverse actions against subordinates when circumstances and duty dictate.

The foregoing in no way proposes to shield from appropriate punitive action any official who deliberately or willfully violates the rights of others.

Passage of S. 775 should take away any incentive to file spurious, vindictive, or frivolous legal actions by those seeking retribution against any Federal employees acting in good faith within the scope of their duties.

In conclusion, the Association of Federal Investigators strongly urges passage of S. 775.

PREPARED STATEMENT OF JACK B. SOLERWITZ

On behalf of the Federal Law Enforcement Officers Association I would like to thank the Subcommittee on Administrative Practices and Procedures for the opportunity to comment on proposed ammendments to the Federal Tort Claims Act suggested in S.775. While official agencies of the government can provide ample testimony on unintended side-effects of Bivens-type suits, the Federal Law Enforcement Officers Association is in a most unique position to describe for you the personal and professional hardships that frivolous and malicious suits have had on the federal law enforcement officers and criminal investigators for whom we provide legal assistance.

The ill-effects of these cases cross all agency boundaries. We have handled these matters for FLEOA members from the Federal Bureau of Investigation, Internal Revenue Service, Immigration and Naturalization Service, Bureau of Alcohol, Tobacco and Firearms, Drug Enforcment Administration and Customs. The length of time and the dollars needed to fight these spurious suits are extensive, and the amounts at stake are immense. No doubt this alone has produced an air of excessive caution on the part of individual agents performing enforcement functions.

While no one in good conscience could argue for the "bad old days" pre-Bevins v. Six Unknown Narcotics Agents, fine tuning the Federal Tort Claims Act is a must or:

1. Personal liability will further hamstring the already declining number of federal enforcement officers and criminal investigators in the conduct of their sworn duties.

2. Budget and manpower cuts may continue to produce suits and/or damages whose costs exceed savings realized by manpower layoffs. For, overworked enforcement officers and other federal employees are inclined to make errors for which they find themselves held personally accountable -- e.g. State Marine Lines v. Shultz (498 F.2nd 1146, 4th Cir. 1974).

3. The public will continue to view the federal justice system as some stumbling giant unable to get out of its own way, unable to prevent its own victimization or the victimization of those who do its bidding.

We believe some of the answers to this dilemma lay in S.775. We would like to suggest others. Enforcement officers and criminal investigators who undertake "good faith acts" in the performance of their official duties should be provided with "qualified immunity". We feel existing sanctions, agency disciplinary procedures, and court sought injunctive relief all more than adequately permit the protection of individuals who suffer violations of their individual and constitutional rights. We also feel the government should be substituted for individual

defendants in all common law and constitutional tort suits arising out of actions or omissions of federal officers "acting within the scope of their office or employment."

In the years since 1971, thousands upon thousands of Bivens-type suits have been brought. But, as of April, 1982, only 13 resulted in judgments against government employees. This point was brought out by the Society of Former Agents of the Federal Bureau of Investigations in materials they made public when Senate Bill 1775 was under study. The court designed Bivens-type suits to insure that individuals had a means to recover damages from federal employees who violated their constitutional rights. It was to serve as a deterrent to further unconstitutional actions. Neither now, nor when decided in 1971, was it intended to subject federal employees to the threat of financial ruin. But, reality and intent do not always run parallel. The law as it currently exists allows our federal law enforcement officers to be threatened with financial uncertainty for interminable periods of time. It cripples their ability to plan ahead for their families, for their children's education, for their retirement. Misuse of the provisions of the Federal Tort Claims Act inflicts on government employees the same massive damage as negligent, violent, or willful violations of constitutional rights inflicts on any citizen. If the damage balanced itself out there might be some justification for the psychic, professional and economic carnage caused, but they do not. The Bivens-type cases overwhelmingly have made government, federal employees and the U.S. judicial system the victim.

How can this victimization be brought to an end? FLEOA believes S.775 with minor modification would go a long way toward achieving that goal. The modifications we suggest are these:

1. The Justice Department must make a rapid determination of "scope of office or employment" for individual enforcement officers and criminal investigators to benefit from the coverage offered by S.775. For that reason, a 30 day period, maximum, should be allowed for certification. This 30-day period should begin the moment the employee's agency is notified that a suit has been brought. A failure to act within the specified time frame should result in automatic certification.

2. Individual enforcement agencies of the federal goverment should indemnify their enforcement employees under the Federal Tort Claims Act for intervention in state felony crimes committed in their presence. In essence, provide "Peace Officer" coverage in all states except those where they are specifically requested by the individal state not to provide such coverage.

3. And, the Attorney General and various agencies should be required to provide to the employee in any subsequent administrative inquiries or disciplinary

> actions all materials relied upon in making the settlement determination and used as a basis for such recommendations. The intent of this provision is to free federal enforcement officers from attempting to defend their actions in nuisance suits strictly on the basis of a "good faith" contention rather than specific facts.

I believe the cases and illustrations, which we will now provide, offer ample examples of the need for S.775, of the need for our suggested changes, and indeed, of the problems federal enforcement officers and our justice system face.

FLEOA's first extensive contact with the problems of Bivens-type suits was encountered with lawsuits stemming from Clavir, et al v. U.S., et al, 76 Civ. 1071. This lawsuit began in March, 1976, and involved 10 named and various unnamed federal agents in addition to supervisory personnel. The Department of Justice only authorized representation for Edward H. Levi, Clarence M. Kelly, Griffin B. Bell, and William H. Webster. Throughout the litigation, which finally ended on September 9, 1982, with a Stipulation of Dismissal, FLEOA represented the individual agents who were sued both as federal enforcement officers and as individuals. For six years our members were required to continue performing their duties with the "Sword of Democlese" hanging over their heads. Their focus on law enforcement, of necessity, had to be replaced by focusing on survival. Unlike senior Justice Department officials who had benefit of government counsel, our members had to defend themselves in a major lawsuit without the backing of their agency.

In yet a second case, a Drug Enforcement Administration special agent driving a government car was involved in an accident with a disabled vehicle. In this action, which began on or about July, 1981, the goverment alleged the agent was not acting within the scope of his employment. Although they eventually withdrew their contestation of the fact that the agent was acting within the scope of his official duty, they did so only in June, 1982, long after the agent was compelled to retain outside counsel and defend his lawsuit throughout the year.

These are not isolated incidents, either. At present, FLEOA represents enforcement officers and criminal investigators, either solely or on an amicus basis with the U.S. Attorneys offices, in the Immigration and Naturalization Service, Customs,the Federal Bureau of Investigation, the Internal Revenue Service and the Bureau of Alcohol, Tobacco and Firearms. These cases serve to illustrate another problem. The time between presentation of the complaint and a determination by the Justice Department on whether or not it will represent the officer is seemingly infinite. Nevertheless, the time in which the individual enforcement officer has to reply is quite finite, usually within 60 days. What makes these time constraints even worse is the fact that agents may not be served personally, but rather their agency is served. If an enforcement officer has been transferred, he has no way of insuring the processing of his request for defense is going through proper channels, nor of even responding

himself within the 60-day time frame. Even assuming that he/she has an opportunity to make a request for representation at the outset, the administrative process frequently does not advise him if he is being represented until the eleventh hour. The trauma this causes does not just effect the enforcement officer, but all other agents and enforcement officers who watch their colleague left to swing in the wind. We have had this problem recently in cases involving two agents in the U.S. Secret Service, six agents in Immigration and Naturalization Service, and an agent in the Bureau of Alcohol, Tobacco and Firearms.

Lets now examine the claims and damages demanded in a typical lawsuit. In one case involving six Immigration and Naturalization Service officers, the plaintiff and his wife demanded the following:

1.	false inprisonment and arrest	500,000.00
2.	punitive on (1)	500,000.00
3.	assault and battery	2,000,000.00
4.	punitive for (3)	1,000,000.00
5.	malicious and criminal prosecution	500,000.00
6	punitive on (5)	500,000.00
7.	negligence in hiring agents	2,000,000.00
8.	loss of consortium for wife	1,000,000.00
9.	theft of jewwlry	10,000.00
10.	libel, malicious prosecution and violation of civil rights	250,000.00
11.	punitive for (10)	250,000.00
		8,510,000.00

If you are staggered by these figures, can you imagine how the enforcement officers feels when served with such a lawsuit? Then, to add the further burden of not assuring them that they will be represented by counsel, is simply unconscionable.

As for coverage of federal enforcement officers who intervene in state felony crimes committed in their presence, we strongly support certification for these individuals also. Almost every agency, whose personnel carry firearms, have arrest powers, and are sworn officers of the federal government, places upon its enforcement officers the burden of responding in such situations. However, many states have not yet conferred "Peace Officer" status on these people. This places the federal law enforcement officer in a "Catch 22." He or she is both mandated to respond, and bound to do so at their own personal risk. In this time of spurious and baseless lawsuits against law enforcement officials such situations ask officers not only to jeopardize themselves and their jobs, but their families as well.

Moreover, when the enforcement officer responds in such a situation, they are required to appear before state investigatory bodies such as the police department, the district attorney's office, or grand juries. During this time, they not only have no representation from the Department of Justice, but no consultation rights so that

they may be advised of the very basic constitutional protections to which they are entitled.

We are encouraged by the language of the proposed amendment which we feel affords to the enforcement officer the protection they deserve. To this we would only suggest three additions:

1. That the proposed amendment be further modified to include the following language under 28 USC 2679 D3 , Page 6, Line 6 "...binding and conclusive. The certification of the Attorney General shall conclusively establish scope of office for purposes of such removal within 30 days of the time the employee's agency is notified of the action. Failure to so notify shall result in automatic certification. In the event..."

2. Similarly, Sec 11. 50 USC 1810 (b)(2). Page 12, Line 18 should read, "...action or proceeding arose. The certification of the Attorney General shall conclusively establish scope of office or employment for purposes of such removal within 30 days of the time the employee's agency is notified of the action. Failure to so notify shall result in automatic certification.

3. Finally, we propose to add to 28 USC 2672 (f) Page 8, Line 2 a provision entitling the employee in any subsequent administrative inquiry or disciplinary action access to all of the material relied upon by the Attorney General or the agency in making a settlement and the basis on which such settlement was recommended. The reason for this is to afford the employee sufficient information to defend himself on all of the facts and circumstances rather than limiting him only to a defense based on "his reasonable good faith belief in the lawfullness of his conduct."

We in FLEOA have taken up the gauntlet and initiated countersuits in the nature of malicious prosecutions hoping to achieve a financial remedy for our enforcement officers and a sizeable deterrent effect as well. In fact, an FBI agent we represent was recently awarded a substantial sum in damages plus treble damages as a punitive damage award. It will be years, however, until this case comes to a conclusion since we must enforce the judgement. It will also be years before the life of that agent and his family can hope to move back towards normalcy.

Senator GRASSLEY. For the record I want to point out that by prior agreement, for the sake of the economy, witnesses at the 5 days of hearings by the Subcommittee on Criminal Law on this bill, S. 829, were asked to testify on the entirety of the bill and not refrain from comments upon those titles of the bill which were jointly referred to this subcommittee or other subcommittees.

Therefore, any study of the hearing record of this tort liability provision should include a review not only of today's hearing and those that I chaired in the last Congress but also the testimony received by the Subcommittee on Criminal Law. A number of witnesses at those hearings have in fact commented upon this title as well.

That concludes our list of distinguished witnesses that we have had. I want to thank this panel and all the other panels and the individuals for your time and contribution. I believe that we have formed a valuable hearing record that we shall submit to the full committee in addition to the testimony that we have heard in the last Congress.

Thank you.

The meeting is adjourned.

[Whereupon, at 12:40 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF JERRY J. BERMAN

ON BEHALF OF

THE AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman:

The American Civil Liberties Union welcomes the opportunity to submit a statement for the record on Title XIII of S. 829, the Federal Tort Claims Act Amendments of 1983. The American Civil Liberties Union is a nonpartisan organization of over 250,000 members dedicated to defending the Bill of Rights. Because this legislation directly affects the ability of citizens to obtain redress for violations of constitutional rights and to deter government officials from violating civil liberties, it is a matter of the highest priority to our organization.

The ACLU Position on This Legislation

We are prepared to support FTCA amendments to make the federal government exclusively liable for violations of rights protected by the Constitution committed by federal officials acting within the scope of their office or employment. Compensation for constitutional violations would be more certain if a "financially responsible defendant" were available to compensate the victims of constitutional torts. We also believe that unnecessary conflicts and costs are involved which make the redress of constitutional harm more difficult when the government must defend employees in such suits or hire expensive outside counsel to provide representation.

Nevertheless, we have opposed all past versions of this

legislation because we firmly believed that they did not accomplish two essential goals: (1) providing adequate compensation to victims of constitutional violations and (2) establishing an effective deterrent against government misconduct as a substitute for individual employee liability. In the last Congress, we believed for the first time that compromise amendments emerged that would accomplish these goals as well as the principal government objectives of (1) ending individual liability and (2) simplifying complex constitutional litigation, amendments that merited the support of the Administration, the Congress, federal employees, civil liberties, and other public interest organizations. The amendments would, like proposals put forward in the 95th and 96th Congress, (1) permit the government to substitute itself as the party defendant if an employee was acting within the scope of his office or employment, (2) waive the "good faith defenses" of its employees, (3) provide for actual damages and minimum liquidated damages in tort cases where harm may be intangible, and (4) award reasonable attorneys fees in cases where plaintiffs prevail against the government. However, instead of requiring an independent disciplinary mechanism with the right of plaintiffs to participate as a substitute deterrent for individual liability, the bill would provide for additional damages in cases where the conduct involved intentional, malicious, or reckless conduct and establish the right to a jury trial against the government.

On May 18, 1983 of this year, the House Judiciary Subcommittee on Administrative Law and Governmental Relations adopted the essential elements of this scheme when it marked up H.R. 595, the House version of this legislation. If the House Judiciary Committee amends the Subcommittee bill to provide for reasonable attorneys fees in cases where plaintiffs prevail and makes other minor changes, we would actively work for its passage.

The Administration's Position

As those familiar with the history of this legislation know, our willingness to support this legislation with an alternative deterrent scheme represents a considerable compromise on our part. Now it is the Administration which refuses to compromise by insisting on "adding" a new defense to government liability by permitting the government to invoke the "good faith defenses" available to individual emp oyees in Bivens suits.

In our view, and it is shared by others who will testify on this legislation, the Administration's position is unprecedented, indefensible, and unacceptable because it will undermine every goal of this legislation: compensation, simplification of litigation, removal of employees from protracted involvement in constitutional tort litigation, and deterrence. Finally, to insist on this defense is to guarantee considerable opposition to the bill and perhaps doom its chances of passage, thus leaving federal employees, the constituency the government purports to represent, still subject to individual liability. After first describing our effort to reach a compromise, we will spell out why we so strongly believe the administration position on qualified immunity is both unsupportable and the principal obstacle to a fair resolution of this legislation.

Resolving the Deterrence Issue

Past efforts to fashion legislation acceptable to the administration, the Congress, federal employees, and interested organizations have foundered primarily because of the inability to solve the deterrence issue and the insistence of civil liberties and public interest groups that only an independent disciplinary mechanism was acceptable. Such a deterrent was viewed as critical because Bivens suits against federal employees, together with the threat of litigation, have played an

important role in motivating federal law enforcement, intelligence, and other government agencies to respect constitutional rights and to develop guidelines and procedures protective of civil liberties. Recognizing that a substitute deterrent was essential to secure passage of the bill, the Carter Administration Justice Department, the Congress, and interested groups devoted considerable effort to devise an acceptable disciplinary mechanism. The inability to develop a mechanism acceptable to all sides was principally responsible for the failure of the legislation to be enacted into law.

While we continue to prefer such an accountability mechanism, we made another effort in the last Congress to break the long deadlock over this legislation by agreeing to consider other possible deterrent schemes. In response the House Subcommittee developed what we believe is a viable alternative. Instead of a formal independent disciplinary mechanism, the Subcommittee in marking up H.R. 24 (reintroduced as H.R. 7034) by amendment adopted two of the principal deterrent elements available under Bivens litigation and made them applicable to suits against the government for constitutional torts: First, the Subcommittee provided "that if the conduct giving rise to the tort claim was undertaken with the malicious intention to cause a deprivation of constitutional rights or with reckless disregard for the plaintiff's constitutional rights, the court shall award, in addition, damages of not more than $100,000." (Sec.2693). Second, the Subcommittee included an amendment to Section 2402 of title 28 of the United States Code to provide a jury trial against the government. Both of these amendments were included in H.R. 595 as introduced and essentially retained by the Subcommittee at markup last week.

It is our view that the award of additional damages in combination with a jury trial against the government will help to deter egregious violations of constitutional rights by federal

employees by providing both an impetus for the government to exercise careful supervision over its employees and to mete out appropriate discipline to employees who intentionally or maliciously violate constitutional rights. Because the Administration has to our knowledge expressed no serious opposition to the award of additional damages, a compromise on the deterrent issue appears within reach. The Administration has expressed opposition to a jury trial against the government but solely on the grounds that it has not been historically available. This is a weak argument, since the government is in this legislation waiving its "historical" immunity from suits based on constitutional violations. Moreover, opposition to jury trials is out of character for an Administration which often bemoans excessive judicial activism. Finally, the fear of excessive jury trial awards is readily answered by the statutory cap on additional damages, although we believe the $100,000 cap is too low and should be raised. To strengthen the deterrent scheme, we believe the bill should be amended to require that an agency disciplinary hearing should be mandated in any case where the court or the jury decides that an official's conduct warrants an award of additional damages.

The Good Faith Defense Issue

Now we turn to the issue which is the current stumbling block to a fair compromise on this legislation, the Administration's insistence on "adding" a defense which will permit it to invoke the "good faith defenses" available to its employees when sued in their individual capacity. Departing from the position of the previous Administration which was prepared to "waive" the good faith defenses of its employees, the Reagan Administration announced that it proposed to invoke those defenses when it introduced S.1775 in the Senate in the 97th Congress. H.R. 24, the House version introduced by representative Danielson, waived

those defenses. Last year the Administration convinced a majority of the House Subcommittee to amend H.R. 24 to adopt the Administration position and a governmental good faith defense was included in H.R. 595 as introduced as well as in Title XIII of S. 829. Now that the House Judiciary Subcommittee has amended H.R. 595 to strike this defense, we strongly urge the Senate Judiciary Committee to do so as well.

The Administration states that it only seeks to "retain the qualified immunity defense and such other immunity defenses as have been recognized by the courts in Bivens actions as available to an individual employee." The highly misleading implication is that such immunity defenses are available to the government under current law. In fact, there is little or no support for this assertion. In this regard, we call your attention to an article by Thomas J. Madden, Nicholas W. Allard, and David H. Remes of the law firm of Kaye, Scholer, Fierman, Hays & Handler which will soon appear in the Harvard Journal on Legislation. The article, "Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits" is based on exhaustive research of common law and FTCA case law and conclusively demonstrates that the government does not have such defenses under current law. We quote the authors, who we understand will be testifying before this Subcommittee on this legislation:

> "(N)othing in established tort doctrine applicable to every analogous situation of private and public vicarious liability supports the proposition that the United States should be permitted to invoke the good faith immunity of its officials in constitutional tort suits. At common law, the majority rule in the private employment context is that an employer sued for the tort of an employee under the doctrine of respondeat superior may not invoke the employee's immunities. Moreover, the majority common-law rule in the public employment context at the state and local levels is that a government agency sued for the tort of a public official under the doctrine of respondeat superior may not invoke the official's immunities. Indeed, in FTCA suits, virtually every federal court that has considered the issue has concluded that (a) the doctrine of respondeat superior does not permit the

> United States to invoke the immunities of its officials and (b) Congress did not intend for the United States to be able to invoke the immunities of its officials in suits brought under 28 U.S.C.Sec. 2680(h). Allowing the government to plead the good-faith immunity of federal officials would afford the government an advantage enjoyed neither by private and public employers at common law, nor by the United States in nonconstitutional tort suits."

The courts have not permitted the government to invoke employee immunities at common law or under the FTCA for legal and policy reasons which are directly relevant to the purposes of this legislation. First, the rationale for the "good faith" defense no longer exists once the government is substituted as the party defendant. The sole rationale for "the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all." Carlson v. Green, 446 U.S. 14, 21 n.7 (1980). The very purpose of substitution is to remove this fear. In a case involving municipal liability for constitutional violations under Section 1983, the Court held that the issue of good faith "is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury." Owen v. City of Independence, 445 U.S. 622, 654 (1980).

Second, once the government is substituted as party defendant, the principal goal of constitutional tort litigation and this legislation is to compensate persons whose rights have been violated. As the Court said in Owen, when employees will not be deterred in carrying out their duties, "(t)he innocent individual who is harmed by an abuse of governmental authority (should be) compensated." Id. at 657. To permit the government to invoke the "good faith " defenses of its employees directly undermines this goal. As the Court observed in Owen:

> "How 'uniquely amiss' it would be if the government itself--the social organ to which all in our society look for the promotion of liberty, justice, fair and

> equal treatment and the setting of worthy norms and goals for social conduct,' were permitted to disavow liability for the injury it has begotten. (Citation Omitted) A damage remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. (Yet owing to the qualified immunity enjoyed by most government officials, ... many victims of [governmental] malfeasance would be left remediless if the [government] were also,allowed to assert a good-faith defense.)" Id.at 651.

In point of fact, it was the ease by which compensation could be defeated by qualified immunities that motivated Congress to amend the FTCA in 1974 to permit recovery for law enforcement conduct that had resulted in the Bivens decision. As Senator Charles Percy stated in introducing the amendments to rescind sovereign immunity of the United States for intentional torts such as false arrest and false imprisonment, "While this [Bivens action against an individual agent] gives victims of abusive tactics some opportunity for relief, their remedy is severely limited by the ease with which agents can usually establish the defense of having acted in good faith and with probable cause." S. Rep. No. 93-469, 93rd Cong., 1st Sess. 36 (1973).

The Administration has all but admitted that the explicit purpose of its amendment to permit the government to assert the qualified immunities of its employees is to "severely limit" the remedy. In a letter to the Chairman of the House Subcommittee responding to the researched conclusions of Thomas J Madden quoted above, Deputy Attorney General Edward C. Schmults admits that no such governmental defense presently exists but believes it is sound policy to absolve the government of damage liability if the conduct of its employees is reasonable. "Under traditional tort law analysis," he writes, "it is the failure to act as a reasonable man in violating a duty owed to an injured person which triggers liability." [See Letter to Honorable Sam Hall from Deputy Attorney General Edward C. Schmults, April 11, 1983.]

But the analogy to negligence law does not stand up when constitutional violations are concerned. Under negligence law, reasonable conduct means no tort has occurred. But the Bill of Rights does not enjoin merely "unreasonable" violations of constitutional liberties but any violation of a right protected by the constitution whether it be speech, press, privilege against self incrimination, jury trial, right to counsel, or other enumerated liberty. The violation is [per se] unreasonable and a tort has occurred. If the government has its way, constitutional violations will often go unredressed. To give just two examples:

> A DEA agent negligently enters the wrong home in search of drugs in the middle of the night. He tears the house apart from top to bottom, subjects the occupants to search as well, and takes them to police headquarters for questioning. A good faith defense would bar recovery. In fact, a tort has not been committed under the Administration's reasoning.

> A presidential Executive Order 12333 authorizes warrantless opening of mail in national security cases. FBI agents, pursuant to the order, open the mail of American citizens suspected of being foreign agents. Later the Supreme Court holds that there is no national security exception to the warrant requirement for opening first class mail. Although the agents are protected from suit under the bill, the government is also absolved of liability by invoking the agents "good-faith" reliance on the President's Directive. The wrong cannot be redressed. The President, of course, is absolutely immune from civil liability under the holding in Nixon v. Fitzgerald, 102 S.Ct. 2690 (1982).

A third reason for opposing a government defense based on the qualified immunities of its employees is that it will undermine the goal of deterring violations of constitutional rights. The threat of individual liability has caused employees to demand that their superiors spell out what "they can and cannot do" which has led to agency guidelines and procedures protective of constitutional rights. If employees are no longer individually liable, they will no longer pressure superiors for clear rules.

If, at the same time, a qualified immunity defense is at the disposal of the government, agencies will not feel compelled to maintain strict and clear rules. The Supreme Court, in Owen, viewed this as a reason not to permit government to have such a defense. As the Court stated, "the threat that damages (which) might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." 445 U.S. at 652 (footnote omitted). FTCA cases have turned on similar reasoning. In Picariello v. Fenton, 491 F. Supp. 1626, 1041 (M.D. Pa. 1980), the federal district court stated that "the imposition of liability on the United States in this case may likewise encourage policymakers to take steps to reduce the chances that [constitutional violations] will occur in the future." We fear not only that the availability of qualified immunity defenses may remove the incentive for government to devise rules protective of civil liberties but may encourage the government to relax rules in order to broaden the available good-faith defenses of its employees.

Fourth, as we testified last year, if the government may raise the qualified immunities of its employees as a defense, constitutional tort litigation, in contravention of the stated purposes of this legislation, will continue to involve complex issues of fact and may require federal employees to spend as much time in court attempting to validate their good faith belief if the government was substituted as they would spend if they were being personally sued. We stand by our testimony even though the Supreme Court in Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982) modified the law of qualified immunity to focus specifically on whether the defendant employee violated an established constitutional right and not on his subjective good faith belief in the lawfulness of his conduct, a decision designed to permit

immunity issues to be resolved whenever possible on motions for summary judgment. But as the cases decided since Harlow demonstrate, "objective" good faith often turn on issues of facts in dispute which make summary judgment inappropriate under Fed. R. Civ. P. 56. In Briggs v. Goodwin, 698 F. 2d 486, 489 n.2 (D.C.Cir. 1983), the Court stated:

> "While courts should be vigilant to dispose of non-meritorious claims at the pretrial stage,....the rules governing summary judgment in cases involving officials claiming a qualified immunity do not differ from those applicable in other contexts."

Similarly, in McSurely v. McClellan, F.2d 309 (D.C. Cir. 1982), the Court emphasized that "even under Harlow's objective inquiry" the question of qualified immunity --i.e., whether the defendant violated clearly established law of which he should have known -- may involve factual issues that cannot be resolved on summary judgment. [Id.] at 320-21.

For example, a warrentless search of a prison inmate's cell violates the Fourth Amendment unless undertaken for a recognized justifiable purpose, making the purpose of the search a factual issue in dispute and summary judgement inappropriate. Similarly, the constitutionality of a warrantless search may turn on whether it was conducted pursuant to a recognized exception to the warrant requirement or whether reliance on such an exception is pretextual. A factual dispute would exist over the circumstances of the particular investigation.

Fifth, the Administration's other reasons for wanting to assert a good faith defense are less than compelling. For example, the Administration worries that government liability will unfairly "stigmatize" the federal employee who may have acted in good faith. First of all, far more stigma attaches today when the

employee is sued personally and the stigma, together with the fear of potential bankruptcy, stays with the employee over the many years required to resolve these cases. If the government substitutes itself as the party defendant, it will, in most cases, be asserting that it stands behind the actions of its employees, thus removing any stigma. The ability to quickly settle suits will also reduce any stigma and if disciplinary action is viewed as unwarranted, no hint of stigma should remain. On the other hand, in some cases, a employee with a "good-faith" defense may warrant some condemnation and discipline: for example, if he or she acted negligently or demonstrated clear incompetence. We believe neither the public nor a government agency will "blame" an employee for unintentionally violating constitutional rights and the fear of such censure does not rise to a level sufficient to sacrifice the goals of compensation and deterrence.

Finally, the Administration raises the issue of "cost" to the government if it cannot assert a qualified immunity defense. The result will be "strict liability" and a raid on the treasury. Of course, the Administration has offered no concrete data to back up it's fear of excessive cost. What we do know for certain is that significant costs are involved in defending Bivens suits, costs which may far outweigh any compensation the government may have to pay to victims of constitutional violations and which, if saved, could be used for this beneficial purpose. High costs will be incurred if the government systematically violates constitutional rights but that would be the fault of the government. Even higher social costs will be incurred if the victims of those violations have no redress. If the Administration's fear is having to pay liquidated damages of $2,000 in "de minimus" cases, the answer is to adopt the House Subcommittee amendment which would permit the court to pay liquidated damages in a range from $1 to $2,000. Legislative

history could make it clear that the Congress intends minimum damages to be paid in "de minimus" cases to discourage plaintiffs from suing over truely technical violations.

The only fair way to resolve this issue is to strike the language in Title XIII of S. 829 which permits the government to invoke the good faith defenses available to its employees.

Reasonable Attorneys Fees

If the purpose of this legislation is to insure that employees are protected from individual liability but that the victims of constitutional torts are compensated then it is necessary to provide reasonable attorneys fees in cases where plaintiffs prevail by settlement or in litigation. The Administration opposes payment of reasonable attorneys fees because they are not available in other FTCA cases and would allegedly encourage counsel to engage in "artful" pleading to take advantage of this benefit of proving a constitutional tort violation.

Constitutional tort litigation differs from other tort litigation against the government in ways sufficient to require the payment of reasonable attorneys fees as a necessary element of a scheme designed to vindicate constitutional rights. First, damage awards in negligence cases, for example, are usually high enough to enlist an attorney on a contingency fee basis. Constitutional tort litigation is complex and difficult, and in many cases, will involve intangible harm where minimum liquidated damages are all that will be awarded. Unless reasonable attorneys fees are available, attorneys will be unlikely to bring suit to vindicate rights in such cases.

While we are prepared to consider other formulations, we could only support FTCA amendments which provide for reasonable or fair attorneys fees. Legislative history should caution the courts to pay close attention to the true gravaman of pleadings to insure

against unreasonable constitutional tort claims. While there is considerable congressional concern over the issue of attorneys fees in government litigation across the board, the appropriate solution is to consider reform in the context of rationalizing government wide practices and not in a piecemeal fashion. Reasonable attorneys fees should be included in this legislation. If this is unsatisfactory in terms of government wide practice, it can and should be changed only in the context of legislation focused on attorneys fees in general.

Conclusion

We believe a fair solution to the issue of federal liability for constitutional torts is within reach. However, we believe for all the reasons we have stated, the Administration must change its position. As introduced Title XIII of S. 829 represents a direct threat to civil liberties and is not only not in the public interest but contrary to the very worthy goals it was designed to achieve. However, if amended along the lines of H.R. 595, the legislation would strike a fair balance betwen the goals of insuring that employees may do their duty without fear of unwarranted litigation or personal liability and the goals of compensating victims of constitutional torts and deterring government misconduct.

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April 8, 1983

Honorable Charles E. Grassley
United States Senate
Washington, DC 20510

Dear Senator Grassley:

Although I strongly support the main purpose of S. 1775 (to transfer tort liability from officers and employees to the government), I believe that many changes, some of which are rather fundamental, should be made before S. 1775 is enacted. The purpose of this letter is to state my reasons and to advance some specific recommendations.

The 1981 and 1982 hearings before your Subcommittee on Agency Administration were limited to broad policy questions, with hardly any mention of the challenging problems of fitting the new legislation into the existing system.

My six objections are highly practical although somewhat technical. I shall first state each one in summary form, and then I shall present my full analysis.

1. S. 1775 in its present form will unnecessarily cause voluminous litigation of the question of what torts are constitutional and what torts are nonconstitutional. The question often is unanswerable on the basis of present law. I think S. 1775 can and should be drafted so that government liability will never depend upon classifying a tort as constitutional or nonconstitutional.

2. S. 1775 transfers qualified immunity of the officer or employee to the government, without taking into account the effects of the discretionary function exception; for nonconstitutional torts the government will have both defenses (transferred immunity and discretionary function), and for constitutional torts it will have only the defense of transferred immunity. I think that (a) the only such defense for either kind of tort should be the discretionary function exception, and (b) the exception should be rewritten to state that the government is not liable for making law or governmental policy.

3. The first clause of 28 U.S.C. § 2680(a), retaining sovereign immunity for enacting a statute or issuing a regulation that is held unconstitutional, should be left unchanged. S. 1775 would restrict the provision of § 2680(a) to "tort claims other those arising under the Constitution."

4. The original Federal Tort Claims Act retained sovereign immunity for the eleven intentional torts that were listed in § 2680(h). Instead of cleanly giving up sovereign immunity for all 11 torts, S. 1775 has very complicated provisions which will cause much litigation and will sometimes assure unjust results. I approve the provision of S. 1775 which makes the government liable for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process,"except that I am unable to understand why those six torts are treated differently from the other five; I think all eleven should be treated in the same way as the six. With respect to the other five, I especially object to the provision that the government sometimes retains sovereign immunity and sometimes not, for that provision is sure to cause much litigation and much injustice.

5. S. 1775 transfers the absolute immunity of an officer

or employee to the government, thereby assuring sharp injustice in many cases. For instance, when a prosecutor knowingly presented false evidence against a criminal defendant who then served nine years in a penitentiary before he was released on a finding that he was innocent, Imbler v. Pachtman, 424 U.S. 409 (1976), I think the prosecutor should have absolute immunity, as the Court held but I think the government should be liable for damages to Imbler. This problem deserves a more refined treatment than S. 1775 gives it.

6. Consideration should be given to establishment of a central office for settling tort claims and for adjudicating the ones that are not settled.

I shall now state my reasons for each of my six positions, along with my specific proposals.

1. Government liability should not depend on classification of a tort as constitutional or nonconstitutional.

Because the concept of "constitutional torts" was not invented until 1971, the law still fails to answer many questions about what is included in the concept. Does an officer's assault violate the Constitution? No one knows. Does failure of prison officials to protect a prisoner against a physical attack by fellow prisoners violate the Constitution? No one knows; the answer might be sometimes yes and sometimes no. Does a prison's negligent loss of a prisoner's property violate the Constitution? The Supreme Court has held that it does if the law provides no adquate remedy but it does not if the remedy is adequate. Parratt v. Taylor, 451 U.S. 527 (1981). When questions of tort liability of the government depend upon constitutional questions that in turn depend upon adequacy of other remedies, complexities multiply and may well become unmanageable. The problem of what torts are constitutional and what torts are nonconstitutional is likely to produce a legal quagmire. The quagmire will benefit no one except those who profit from useless litigation.

Let us consider a single example. The FTCA as amended by S. 1775 will provide that the FTCA "relating to tort claims other than those arising under the Constitution. . .shall not apply to. . .misrepresentation, deceit . . ." The government will be liable for misrepresentation or deceit only when the Constitution is violated. But when does an officer's misrepresentation or deceit violate the Constitution? No judge, no legislator, no executive, and no practitioner can answer the question, for no law on the question has yet been created. The courts will have to produce the answer by case-to-case adjudication. That task, just on the problems about misrepresentation and deceit, will be a rather large one. But hundreds of other questions about what torts do or do not violate the Constitution will also have to be worked out by the courts. The task for the courts will be both onerous and wasteful.

The alternative to dumping the whole unnecessary problem of trying to determine what torts do or do not violate the Constitution is both simple and attractive: S.1775 should avoid any provision that makes governmental tort liability depend upon the distinction between constitutional torts and nonconstitutional torts. In the misrepresentation example, what is needed is obvious: The government should be liable for damages for any injury its officer, within the scope of his office, deliberately inflicts on the plaintiff through misrepresentation or deceit, whether or not the Constitution is violated.

Similarly, S. 1775 is faulty in that the discretionary function exception will apply only to nonconstitutional torts and will never apply to constitutional torts. No good reason exists for not applying the discretionary function exception to all governmental torts, whether constitutional or nonconstitutional, because the government should never be liable in tort for making law or governmental policy, and S. 1775 can so provide. (I am aware of the argument that constitutional torts are based on the Constitution and that therefore Congress cannot legislate on them, but I am

confident that if Congress legislates responsibly for proper reasons, the courts will sustain the legislation; after all, the Supreme Court knows that it needs the help of Congress in working out the problems about constitutional torts, and its Carlson opinion, 446 U.S. 14, 18-19, seemingly invited congressional help.)

2. S.1775 would deprive the government of the discretionary function exception in actions for constitutional torts, and in all tort actions against the government it would transfer to the government whatever immunity the officer or employee may have. The result would be to make the government liable in some cases in which it should be immune, and to make the government immune in some cases in which it should be liable.

The government in every tort suit against it should always be allowed to assert the discretionary function exception, because the government should never be liable for governing. When Congress decides what to do about governing, the United States should not be liable to those who are adversely affected, and the same is true when an officer to whom Congress has delegated power does the governing. Probably all legislation hurts someone, and probably all exercise of delegated legislative power hurts someone, but one who is hurt when the government or someone on its behalf makes law or governmental policy should not for that reason be allowed to collect damages from the government. Something in the nature of a discretionary function exception is always essential when the government is the defendant. The judgment of those who in 1946 created the discretionary function exception is §2680(a) was a sound judgment. The heart of what they decided should be retained. But with the benefit of the experience since 1946, I think that the phraseology of their idea can be improved. I would change "discretionary function" to "making law or governmental policy." What I would do is essentially what most federal courts have been doing during the past five years, and I think the main strand of what the courts have recently done can properly now be codified. An outstanding opinion is Blessing v. United States, 447 F. Supp. 1160 (E.D.Pa. 1978).

The discretionary function exception (the second clause of §2680(a)), should be preserved. It should apply to suits for both constitutional torts and nonconstitutional torts. It should not be cut into by the provision of S.1775 that would limit §2680 to "tort claims other than those arising under the Constitution." The effect of that provision, if enacted, would be to deprive the government of the discretionary function defense for constitutional torts. I think that depriving the government of that defense is clearly undesirable, because I think that the government should never be liable for making law or governmental policy.

The legislative history of the Federal Tort Claims Act of 1946 is meager and uninspiring, but the complete absence of opposition to the discretionary function exception may be quite significant. The meaning of "discretionary function" was left vague, but the statute was clear in providing against government liability for performance or failure to perform a discretionary function "whether or not the discretion involved be abused." The Supreme Court soon generalized broadly but accurately that "it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function." Dalehite v. United States, 346 U.S. 15, 28 (1953). That statement of the Supreme Court embodies the congressional intent and embodies the Supreme Court's own policy view; it is quite fundamental, it is absolutely sound, and it is quite essential. When such a desirable breakthrough has been accomplished through the combined action of Congress and the Supreme Court, it should not be casually cast aside. But S. 1775 throws it out with respect to constitutional torts. That will be a long step backward, in my opinion, and I believe that if Congress enacts S. 1775 in its present form, the experience without a discretionary function exception will soon impel Congress to restore the exception, because making the government liable in damages for governing is so clearly undesirable.

I recognize that transferring to the government whatever

immunity the officer or employee may have can to some extent, perhaps to a considerable extent, serve the purpose that the discretionary function exception has been designed to serve. Four possible systems are to allow the government (1) the discretionary function defense, (2) the transferred immunity defense, (3) both such defenses, and (4) neither such defense. I believe that analysis of the problem leads to the conclusion that Congress reached in 1946--that the discretionary function defense should always be allowed, and I believe that each of the other three solutions should be rejected.

The worst solution would be the fourth one--depriving the government of both such defenses. S. 1775 provides the third solution for nonconstitutional torts, and it provides the second solution for constitutional torts. But the second and third solutions are inadvisable, because transferring the immunity of the officer or employee means that a defense created and planned to take care of the needs of officers and employees will be applied to the government, and that will be a misfit, as I shall now try to show.

The transferred immunity will do too much in some cases and too little in other cases; the government will not be liable when it should be, and it will be liable when it should not be.

The main purpose of qualified immunity is to protect the officer from his natural tendency to think of his own pocketbook when he is required to take what the courts often call "fearless" action to protect the public interest. The classical illustration is along this line: If the officer finds that the contagion is spreading and that the public interest requires a quarantine, the officer is more likely to protect the public interest fearlessly if he knows that he will not be personally liable as long as his action is reasonable and is taken in good faith; if the officer must think of his own pocketbook, he is unlikely to be fearless in protecting the public interest. The purpose of qualified immunity is to protect the public by freeing the officer from motivation that grows out of his own possible liability. Although that purpose is entirely appropriate when the officer is the defendant, the officer will never be the defendant if S. 1775 becomes law; the government will always be the defendant.

Choosing between the injured plaintiff and the officer in determining who must bear a loss is quite different from choosing between an injured plaintiff and the government. Imposing liability on an officer will vitally affect all officers' motivation; imposing liability on the government will not. For instance, the four dissenters in Butz v. Economou, 438 U.S. 478 (1978), asserted that imposing liability of officers had "potential for disruption of government." Id. at 526. Their idea was that officers' liability will impair the interest of the public in getting the government's job done; their view rested on that of Judge Learned Hand in Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1948), that it is "in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." The "dread" related to the officers' thoughts about their own pocketbooks. It did not relate to the seemingly unlimited pocketbook of Uncle Sam.

The government clearly should be liable for some torts for which the officers who commit the torts should be immune. When the government through its officer has committed a wrong and the plaintiff is therefore deserving, the government should be liable, because its wrong has caused the loss. Similarly, the officer should be liable, because its wrong has caused the loss, except for the further fact that imposing liability on the officer may adversely affect the motivation of officers to protect the public interest. For centuries, officers have been immune from tort liability for torts committed within the scope of their governmental employment. The Supreme Court has surveyed the history, with citiations to English practice as far back as 1275, in concluding that official immunity rests in part on "the danger that the threat of such liability would deter [the officer's] willingness to execute his office with the decisiveness and the

judgment required by the public good." Scheuer v. Rhodes, 416 U.S. 232, 239-40 (1974). Liability of the government does not have the same effect upon an officer's willingness to execute his office with the desired decisiveness. The court went on to say of "the general concept of immunity" that "one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public. . . . Public officials . . . who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity--absolute or qualified--for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to act at all." Id. at 241-42.

The facts of Scheuer v. Rhodes provide an excellent illustration. The Court held that the Governor, the Adjutant General, the President of Kent State University, and others involved in the killing of students had a qualified immunity, that is, the officers were not liable if they acted reasonably and in good faith, even if the deaths were caused by their wrongful action. The result was fair because, even though the deaths were unjustified, imposing liability on officers for reasonable action taken in good faith might mean that the public interest the officers were trying to protect would go unprotected. But that justification for deciding against the plaintiffs disappears when the government is the defendant; the government should be liable for wrongful action, despite both reasonableness and good faith.

Because the reason for the officer's immunity relates to the officer, not to the government, the reason does not apply when the government, not the officer, is the defendant. The reason for the officer's immunity is strong enough to justify denial to a deserving plaintiff of relief from the officer, but it does not justify denial to a deserving plaintiff of relief from the government.

On the facts of the Scheuer case, the Court properly allowed the officers a qualified immunity, despite the fact that they wrongfully caused the students' deaths, because imposing liability despite reasonableness and good faith would deter all such officers from doing what is necessary to protect the public interest. But if the government, rather than the officers, had been the defendant, liability could properly be imposed, because imposing liability on the government would not deter officers from doing what is necessary to protect the public interest.

So, on the facts of the Scheuer case, the provision of S. 1775 transferring the officers' qualified immunity to the government would be clearly undesirable. On those facts, S. 1775 would make the government immune when it should be liable.

On other facts, S. 1775 would make the government liable when it should be immune; that would be the result whenever S. 1775 deprives the government of its discretionary function defense in circumstances in which the transfer of officers' immunity does not offset the absence of the discretionary function defense.

For example, let us assume that the X Company alleges that the State Department did not negotiate in good faith with a foreign government about an expropriation of X Company's property, but that it traded the X Company's case for a favorable determination of the Y Company's case involving other subject matter. Under present law, the government is protected from liability by the discretionary function exception of § 2680(a); it probably should be so protected, because trading one case for another in the light of all the circumstances is highly discretionary and determines governmental policy. But if S. 1775 were applied according to its terms, the government would be liable; the transferred immunity of the officers would not protect it, because by hypothesis

the officers were not acting in good faith in deciding X Company's case on a basis other than the merits.

The conclusion is that S. 1775 is undesirable in that it will (a) sometimes make the government liable when it should not be and (b) sometimes not make the government liable when it should be.

The best system will be one in which the discretionary function exception will be continued in all cases, and the immunity of officers and employees will not be transferred to the government.

3. The United States should not be liable in tort for making law or making governmental policy even if the law or governmental policy is unconstitutional.

The first clause of 28 U.S. C. § 2580(a) is perfectly satisfactory and should not be changed; it provides that the FTCA, waiving the government's sovereign immunity, does not apply to "Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." S. 1775 would make the United States liable for violations of the Constitution, for it provides that §2680 will be applicable only to "tort claims other than those arising under the Constitution."

The astonishing effect of S. 1775 will be to make the United States liable in tort for enacting and carrying out a statute that the courts later hold to be unconstitutional. The single exception will be the transferred immunity of the officers and employees who participate in producing the unconstitutional action; the principal such officers will be members of Congress. So the courts will have to determine whether or not members of Congress have acted reasonably and in good faith in enacting legislation that the courts hold to be unconstitutional. That will be unseemly. I suppose doubt sometimes exists as to whether Congress does sometimes deliberately risk unconstitutionality; President Roosevelt during the 1930s asked Congress to enact a bill despite doubts about constitutionality; he said the doubts could be resolved only by the Supreme Court, which could reach the question only if Congress enacted the bill despite its belief that the enactment probably would be held unconstitutional. Did Congress act in bad faith in following the Roosevelt recommendation? Perhaps the question could be answered either way, depending on the relevant political attitudes; the Supreme Court of 1935 probably would have found bad faith.

If the system set forth in S. 1775 had been in effect in 1935, when the Supreme Court held the National Industrial Recovery Act unconstitutional, the government would have been liable in tort to every business in the country that suffered some disadvantage from the NIRA, unless the courts found that the Congress which enacted the NIRA and the officers and employees who administered it acted reasonably and in good faith.

The first clause of § 2680(a) is entirely sound and should be continued. The provision of S. 1775 which will limit it to "tort claims other than those arising under the Constitution" should be deleted. The United States should never be liable in tort for making law or governmental policy, whether the United States acts through Congress or through an officer or employee.

4. The government should be liable for all eleven intentional torts listed in the original § 2680(h).

The FTCA of 1946 retained sovereign immunity for the eleven intentional torts. The 1974 amendment made the government liable for claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution," with regard to "acts or omissions of investigative or law enforcement officers." In the 1974 legislation the government retained sovereign immunity for claims arising out of "libel, slander, misrepresentation, deceit, or interference with contract rights." If S. 1775 becomes law, the sovereign immunity for those five torts will

continue unless the Constitution is violated, but the government will become liable for claims arising out of each of the five torts if the Constitution is violated.

For reasons stated above, I think the government's liability should not depend upon the determination of whether the Constitution is violated; in addition, I think that any retention of sovereign immunity for the listed intentional torts is clearly undesirable. I have never encountered any satisfactory reason against making the government's tort liability the same with respect to the intentional torts as it is for a private corporation or an individual. If the officer or employee is acting within the scope of his authority and causes an injury for which a private party would be liable in tort, why should the government not be equally liable? More particularly, if the officer or employee, acting within the scope of his authority, commits "libel, slander, misrepresentation, deceit, or interference with contract rights," why should the government be liable if the officer or employee violates the Constitution but not liable if the Constitution is not violated? I think no satisfactory answer to that question can be found; I think the government should be liable for each intentional tort committed by an officer or employee within the scope of his authority, whether or not the Constitution is violated.

Uncle Sam should strive to be fair. Is Uncle Sam fair if he fails to assume liability for intentional torts committed by his officers and employees within the scope of their authority?

The unthinking belief that Uncle Sam should not be liable for intentional torts because taxpayers should not have to pay if a janitor rapes a secretary is obviously unsound. The government would not be liable, because rape is clearly outside the scope of the janitor's authority. The question is whether Uncle Sam should pay for torts within the scope of authority of the officer or employee. The right answer to the question is elementary: A principal should be liable for torts of an agent committed within the scope of the agent's authority. Uncle Sam as a principal should be treated in the same way as a corporation or an individual, in absence of some reason to the contrary. The only reason to the contrary is that the King can do no wrong, and that reason does not apply to the United States.

5. The provision of S. 1775 transferring absolute immunity of an officer or employee to the government will often cause injustice and should be rejected.

The best example may be Imbler v. Pachtman, 424 U.S. 409 (1976), in which the Court held that a prosecutor had absolute immunity even though he knowingly presented false evidence against Imbler, who then served nine years in the penitentiary before he was released on a finding that the evidence against him was false and known to the prosecutor to be false. The Court properly so held, because a decision making the prosecutor personally liable might result in thousands of actions by convicts against prosecutors, alleging prosecutors' misbehavior.

The Imbler suit was against the prosecutor, not against the government. Under § 2680(h), the government retains sovereign immunity for "malicious prosecution." I think Congress in amending § 2680(h) should not retain that sovereign immunity.

When a federal judge was convicted of corruptly using his judicial office, United States v. Manton, 107 F.2d 834 (2d Cir. 1938), cert. denied 309 U.S. 664 (1940), the judge had absolute immunity from liability to those who suffered from the corruption, but the government should appropriately be liable for the tort committed by its agent within the scope of his office. The absolute immunity should apply to the judge but not to the United States. If the loss has to be borne either by the victims of the corruption or by the taxpayers, surely, as a matter of justice, the choice should be easy.

I believe that when the government, through an officer who acts within the scope of his office or authority, causes Imbler

to serve nine years even though innocent and causes a party to litigation to lose on account of bribery, the government should make reparation in order to avoid extreme injustice.

The problem is whether deserving plaintiffs can be compensated without creating a flood of litigation against prosecutors and judges. I think it can be.

I propose that a tort claims agency should be established, perhaps in the Department of Justice, to which all tort claims against the government may be presented, including claims for torts committed by officers who have absolute immunity. The many claims that are obviously undeserving can be inexpensively rejected. But the screening can usually discover the few cases like Imbler's that are quite deserving. Even though such cases are few, taking care of them is essential to a satisfactory system of justice. This proposal merges with the next one.

6. Consideration should be given to establishing a central office for settling or adjudicating tort claims against the government. Substituting the government as defendant in all suits against officers or employees will vastly increase the number of claims against the government. In any good system nearly all such claims should be disposed of without either judicial proceedings or formal administrative proceedings. Instead of the present system of allowing each agency to try to settle informally, a central agency, perhaps in the Department of Justice, could (a) more efficiently work out settlements, and (b) when settlements fail, conduct administrative proceedings to determine liability, subject to limited judicial review in accordance with the substantial evidence rule.

Because all claims will be against the government and because suits against the government for damages should not be resolved by juries, the reasons behind the assumption that court trials are appropriate will disappear. A specialist agency, using administrative law judges for taking evidence, can do the job much more efficiently than the district courts.

I hope these comments will be helpful to you and your committee.

Perhaps I should add that I represent no one but myself. My only interest is scholarly. Four volumes of the second edition of my Administrative Law Treatise have been published, and tort liability will be considered in volume 5, now in preparation. You may find useful the treatment of recent law of tort liability at pages 395-87 of the 1982 Supplement to my Administrative Law Treatise, especially § 26.22, entitled "Twenty Questions about the Supreme Court's New Law."

Sincerely yours,

Kenneth Culp Davis

PREPARED STATEMENT OF J. H. McQUISTON

Mr. Chairman and Members of the Subcommittee:

For several years I have been analyzing Bivens cases, particularly regarding problems of compensation, correction & deterrence, and their impact on the United States.

Most authorities have been unable to distinguish between the unconstitutional acts of a federal agent and any other person, and there is a strong movement by Congress toward placing Federal and other litigants on a completely equal footing. Yet Section 1983 of Title 42, United States Code, still fails to provide a private remedy for persons injured when federal agents deliberately violate their rights, privileges, or immunities secured by the constitution and laws.

Nevertheless, Section 242 of Title 18 proscribes unconstitutional acts of federal agents, and it prescribes a fine and imprisonment for any perpetrator. To assure that the United States will not be connected to such acts of "bad faith", Section 2680(h) of Title 28 specifically prohibits their jurisdiction under the FTCA.

This policy has been unwavering ever since this country's inception. For example, Navy Captains who unlawfully seized ships, while following orders from the Secretary of the Navy in the 1800's, were held personally liable for court costs, attorney fees, punitive and compensatory damages because they should have realized the orders were unconstitutional. See, e.g., Murray v. Charming Betsey, 6 U.S.(2Cranch) 64 (1804); Little v. Barreme, 6 U.S. 170; Maley v. Shattuck, 7 U.S. 458 (1806).

The principle is sound:

> No employee should be coerceable into violating anyone's constitutional right.

I believe that in any organization as large as the United States government it is imperative that Congress should not weaken this principle. S.775 must be amended. because its language supports the discharge of any employee who refuses to perform an unconstitutional act when officially ordered to do so.

RESPONDEAT SUPERIOR

The Bivens theory is not limited to individuals. An agency may officially violate someone's constitutional right. But such an act is not an act of agency, because the United States cannot officially perform an unconstitutional act. We must therefore address in S.775 how an agency may authorize or ratify an unconstitutional act of one of its members, without enmeshing the United States itself in the liability therefor. For surely Congress has no express constitutional authority to authorize unconstitutional acts, nor may it provide compensation therefor on behalf of the United States.

That does not mean that an agency admitting or convicted of violating a person's substantive constitutional right should not also be required to compensate the person. It merely means that the source of the compensation must be

from the agency itself (i.e. from the staff) or from its insurer, and not from funds of the United States.

Federal agents plead that respondeat superior immunizes state and local agents who are prosecuted with their agencies under section 1983 of title 42, but that is not true. See, e.g., Parratt v. Taylor, 451 U.S. 527, n.3 (1981). As the Supreme Court said in Smith v. Wade, 51 LW 4409 (Apr 19, 1983):

> "[I]ndividual public officers were liable for punitive damages for their misconduct on the same basis as other individual defendants. * * [W]e have had occasion * * * to make clear our view that they are available; indeed, we have rested decisions on related questions on the premise of such availability.[5]
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> "Note 5: [F]or example, we held that a municipality (as opposed to an individual defendant) is immune from liability for punitive damages under §1983. A significant part of our reasoning was that deterrence of constitutional violations would be adequately accomplished by allowing punitive damage awards directly against the responsible individuals.
>
> "By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. * * *
>
> "Similarly, * * * we stated that punitive damages would be available in an action against federal officials * * * partly on the reasoning that since such damages are available under §1983, it would be anomalous to allow punitive awards against state officers but not federal ones."

And in note 11 it said:

> "[T]he issue was whether a corporation could be liable in punitive damages for the tort of its employee. The Court, reasoning largely from general principles of respondeat superior, held that such vicarious liability could exist only when the employer had authorized or ratified the tort."

Federal agencies are charged with knowing constitutional requirements; that concept is not only statutory (5 USC 552(a)(1)) but well settled (Morton v. Ruiz, 415 U.S. 199(1974)). Agencies and agents must follow laws and procedures protecting the rights of persons. Therefore, a party injured by an agency and an agent thereof has a cause of action against both. Presently, courts will apportion the damages between the agency and agent, as is appropriate to the situation. See, e.g., People Organized v. Thompson, et al, 559 F Supp 54 (N.D. Ill 1983).

IMMUNIZATION

Once agency culpability is shown, the agent should not be immunized, but must remain liable to the extent determined by the forum.

This requirement is absolutely necessary to prevent the governmental structure from becoming monolithic. It prevents the hierarchy from ordering an agent to perform an unconstitutional act, and it prevents an agent from seeking support in the hierarchy for his unconstitutional act.

S.775

S.775 proposes to establish an unreviewable procedure whereby the

Attorney General alone will decide whether any employee's unlawful act was committed officially. If the act was "official", S.775 would immunize the agent, transferring by implication all personal responsibility therefor directly to the President alone. Implicit in the bill is the fallacious presumption that the Attorney General will be selective in his decisions. But presently, given the same choice (in habeas corpus actions) he is not selective, and to change policy for S.775 would require incredible stupidity of the Attorney General. Clearly all employee acts will continue to be called "official". See, e.g., Morgan & Swanson, CV 83-0664-R (C.D. Cal, 1983).

It is this combination, of unilateral and unreviewable power plus monolithism, that renders S.775 deficient.

ALTERNATIVE PLAN #1

Instead of the plan in S.775, if the Attorney General is authorized to admit that the agency authorized or ratified the unconstitutional or unlawful act of the employee, to permit the suit to go forward against both employee and agency, then the agency could settle its liability with the injured party without compromising the United States' case against the employee under Title 18. Nor would the employee be compromised into confiding his guilt to his potential prosecutor.

However, there is still no reason for the United States to pay the agency's admitted debt. The agency is comprised of people, who are responsible for the propriety of that agency. Congress may therefore hold the agency supervision and the violator's fellow workers selectively liable for the agency's share of liability, or it may require the agency to acquire insurance coverage (from the United States or otherwise) payable from funds not appropriated by the United States. Moreover, if the agency is circumspect the judgment-fund assessment upon its entire staff would be very modest.

Under this alternative, the decision of the Attorney General will not be a mere rubber stamp. It will require of him at least an inquiry to determine the appropriate payment pool. Moreover, the fact that the staff may be held jointly responsible for an agents' evil act provides a salutary mutual protection which will be a strong deterrent factor. Thus it more equitably solves the problem S.775 proposes to attack.

As in H.R. 595, the provision for jury trial should be left to the discretion of any party to the action.

Appendix #1 contains proposed statutory language for this purpose.

ALTERNATIVE #2

If, however, Title 42 is amended to extend to federal agents the same liability for their unlawful acts as their state and local counterparts have, then there is no need for other statutory controls.

The advantages of uniformity and familiarity accrue if Title 42 is amended. There are no disadvantages.

Inasmuch as Chapter 13 of Title 18 does not distinguish crimes of

federal and local officials, it is anomalous to distinguish private remedies therefor.

Appendix #2 contains proposed statutory language for this purpose.

LITIGATION EXPENSES

In suits of this kind it is absolutely necessary for the injured party to recover his litigation expenses. Otherwise, a remedial suit is financially impossible and there is no real remedy for the unconstitutional depredation.

For suits successfully brought against the agency, the Equal Access to Justice Act will support an award. However, if the suit lies against the individual alone, EAJA does not apply. That is why it is important to explicitly include such expenses in section 1988 of Title 42.

Appendix #3 contains proposed statutory language for this purpose.

* * *

I am sorry I cannot be present to answer questions at the hearing May 26, but I will gladly answer correspondence at your pleasure. However, I believe it would be suitable if S.775 is not reported out of Committee at this time.

APPENDIX 1

Add to Title 42:

1987(a) Every federal agent or agency who, under color of any statute, ordinance, regulation, custom, or usage, of any government or agency thereof, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, shall be liable to the party injured in an action at law, suit in equity, or other proceeding in redress.

(b) The Attorney General may certify that an action in respondeat superior should lie against a federal agency or a member of the armed services, in addition to any action that may lie against a federal agent in an individual capacity under subsection (a); and the agency shall be added jointly and severally to such action upon such certification.

(i) Such certification shall be provided within 30 days of formal request by any party or injured person, and need not be preceded by filing an action.

(ii) If no certification or negative declaration is filed within the time limit specified, any party may petition the court of proper venue for such certification by the court.

(c) A responsive pleading on behalf and in favor of a federal agent by the United States and filed in any civil or criminal action shall per se constitute a certification of subsection (b) of this section: that the acts which form the basis of the pleading were performed by the agent in his official capacity, that an action in respondeat superior lies against the agency, and that the agency is collaterally estopped thereby with respect to further certification or decertification.

(d) No funds of the United States shall be expended to defend any federal agent who in his individual capacity and not in his official capacity is alleged to have violated subsection (a) of this statute.

(e) An action against an agency under subsection (a) of this statute shall be treated as if it were an action against a private person, subsequent to certification under subsections (b) or (c).

APPENDIX 2

Amend section 1983 of Title 42 to read:

Every person or agency who, under color of any statute, ordinance, regulation, custom, or usage, of any government or agency thereof, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. A suitable proceeding for administrative redress, if available and providing a complete remedy, is to be the preferred method of determining compensation. No vicarious liability by any agency shall be presumed in any action pursuant to this section.

APPENDIX 3

Amend the second sentence of section 1988 of Title 42 to read:

In any civil action or proceeding to enforce a provision of the constitution of any government, or chapters 5 & 7 of title 5, United States Code, or any Code section permitting a private cause of action if it or another section permits a comparable public cause of action, or sections 1981, 1982, 1983, 1985, 1986, and 1987 of this title, title IX of Public law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, its reasonable litigation expenses, to be paid by the non-prevailing parties in the amounts as the court shall order.

Add the following two paragraphs to section 1988 of Title 42:

To receive an award of litigation expenses under this section, prior to filing suit a prevailing plaintiff must have given notice of the alleged injury to the losing party; and a suitable time thereafter, to enable the losing party to effect a cure thereof, must have elapsed before the suit was filed, or else the fee award may be adjusted to compensate therefor at the discretion of the court.

No party shall be liable for that portion of litigation expenses which the court decides is not reasonable.

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Mr Rick Irby
Executive Office of the President
Office of Management & Budget
Washington, D.C. 20503

March 29, 1983

Dear Mr Irby:

REFERENCE: Draft Legislation - - ATTORNEYS' FEES

This letter expands upon our telecon of March 22, 1983.

Attorney-fee legislation must realistically be classified according to its raison d'etre:

I. To prevent suits by interposing an insurmountable economic barrier.

II. To control litigation by imposing cost/benefit requirements on parties.

III. To regulate all commerce pertaining to attorneys.

DRAFT LEGISLATION

Your draft legislation unquestionably must be classified under reason #I, but I believe legislation toward that end is neither wise nor achievable. I believe it would be a serious political mistake for anyone to pursue such a policy.

You insist that there was no intent to prevent remedial suits by making them financially impossible; however, the nature of these suits requires that the transgressor should have to finance them completely, or else they cannot be brought.

You say that the intent was merely to define the limit of a "reasonable" litigation expense. Although I share your concern about the cost of litigation, and herein I suggest ways to minimize the cost, I believe the courts don't need another definition of "reasonableness". If you don't already believe a standard exists, I suggest that you consult the ABA Code of Professional Responsibility. The courts now are required to follow it.

Inter alia, the Code states:

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in

the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

Judges, as lawyers and court disciplinarians, are constrained to "review the facts" and to decide if the fee is "in excess of a reasonable fee" according to DR2-106. That fee can't be called "unreasonable" simply because it departs from the attorney's contract with the suing party (see EC2-16). See, e.g, Shadis v Beal, 685 F2d 824 (1982). But if the judge reduces the fee as "unreasonable", the attorney may not thereafter, being an "officer" of the court, charge to anyone the amount in excess of the judge's determination. See, e.g, Cooper v Singer, 689 F2d at 934 (1982).

Courts of Appeals have declared that a judge commits reversible error if he fails to conform his examination to DR2-106 (otherwise known as the "Johnson", "Lindy", "Kerr", etc, factors, after case law in the various circuits) when the judge determines the fee award.

Please examine Ruiz v Estelle, 553 F Supp 567 (1982). Therein you will find a comprehensive discussion, of numerous considerations confronting a judge during a typical review of the facts, and demonstrating conclusively yet concisely some reasons why your draft legislation would keep deserving litigants from getting their well-deserved relief.

I believe, therefore, that your legislation in its present form is pernicious and undesirable. It would only undermine the authority of the courts to render justice, which presently the courts are exercising with due care or else are being reversed, under the watchful supervision of the appellate courts.

REFORM WITHOUT LEGISLATION

I don't believe reform is unnecessary. Some reform doesn't even require legislation to accomplish. For example, under EAJA Congress said:

"It is intended to caution the agencies to carefully evaluate their cases and not to pursue those which are weak or tenuous".

If it had heeded advice like that in Ruiz v Estelle, Texas would have saved every party from expending considerable effort and resources. Texas Dept of Corrections was beyond propriety; even the US entered the fray aligned with the "private attorney general" against it. Yet, according to Judge Justice's account, TDC used its "deep pocket" not to counteract the injustice but to retaliate against the "whistle-blowers".

First, TDC resisted the attempt to get corrective action. Second, TDC resisted the judgment itself. Third, TDC resisted compensating the "whistle-blowers".

At each stage of the process, there was no fiscal oversight agency to evaluate TDC's intransigence for cost effectiveness.

The Federal Government's oversight typically fares no better than did Texas'. Despite EAJA's admonition, DOJ still has no guideline by which its attorneys would feel obligated to settle cases or support litigation-expense awards as called out in the EAJA policy statements. To the contrary, DOJ's 50-page static guide, "Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act", written in 1981 by its Office of Legal Policy, contains not one word encouraging any concession whatsoever.

The practical result of DOJ's hard-line approach has not coincided with Congress' expectations. After one year of full operation, litigation expenses incurred by DOJ under EAJA greatly surpassed even the potential of the awards. And excepting Fitzgerald (case compromised before decision), and G.L.A.D. (award under Rehabilitation Act), millions worth of supplies, salaries, procedures, facilities, courtroom time, and lost alternatives therefor, were expended to decide less than $50,000 in awards, one of which was being threatened to be appealed to the Supreme Court even though it was only $3000 and had no precedental value. Congress, on the other hand, had expected to see awards up to $92 million during that period.

Such a result is not cost effective. OMB should recommend some cost-effective guidelines for DOJ to follow in future cases.

I believe a simple and effective guideline might be to restrict each party, on a separate basis, to adversary process only in substantial cases. "Substantial" would include any case where the fee award in jeopardy for that party exceeds a fixed percentage of that party's gross income or assets (perhaps 1%). Thus, an impoverished party could appeal what a wealthy party could not. A percentage limit thus reduces all parties to an equal footing; yet each could only object to "substantial" issues.

OMB could insist unilaterally that Federal agencies should limit their objections according to such a guideline, without legislation. Such a policy could insure that agency funds were being spent fixing a problem rather than covering it up. But of course, nothing would need to be done unless the "whistle-blower" proved that he had standing to sue on account of the problem complained of.

Inasmuch as Federal courts have only a limited jurisdiction, a whistle-blower that survives the government's automatic motion for dismissal must have demonstrated a substantial right to have the case heard. Inasmuch as some statutes don't even require such a party to "prevail" to be entitled to an award, but that most statutes award expenses to a prevailing party "as a matter of course", economic principles suggest that litigation may be counterproductive after "standing to sue" is proven by a whistle-blower.

The government stands to lose a considerable amount of resources even if it wins. And if a losing agency had done its job properly, the suit would not have wound up being adjudicated.

In my testimony to the Senate Judiciary Committee Dec 9 (enclosed), I demonstrated mathematically that automatic "no-fault" awards to prevailing parties are cost-effective. Furthermore, no-fault awards create no damaging precedents. Moreover, government personnel thus freed from the suit are able to work on their primary missions. Finally, even if presented ex parte every fee request would still be examined by the court for reasonableness per DR2-106, and fraudulent requests would still be punishable separately by other statutes.

Thus, there is plenty OMB can accomplish regarding efficiency that doesn't require Congress to act.

FRAUD CONTROL

Although the judge will examine the party's documents, it won't always be possible for him to discover mistakes or fraudulent entries, because neither he nor the opposing party has a reliable investigator at hand. But existing statutory law (18 USC 1001) provides a strong deterrent to fraudulent claims by any party. So it is not necessary to take a fee award hostage to a fraud inquiry by the court, nor to substitute arbitrary "caps" for proper compensation on the off-chance that the attorney's fee bill is improper.

Legislation could easily provide access to a convenient auditing agency in cases above a threshold amount (say $50,000 or $100,000). Contracting statute 10 USC 2306(f) already requires audit confirmation for claims above a certain amount, or when the contracting office desires it. A "private attorney general", acting for the government, is like a government contractor having as his subcontractor an attorney. It would not seem improper to require such recipients to submit to audit and to be constrained to limits on profitability. The Defense Contract Audit Agency could perform such an audit. That agency is likely to be both disinterested and competent. Its report could go directly to the Justice Department and wouldn't have to go to the court.

Propriety of expenses is not a simple problem, however. The idea of the tail (attorney) wagging the dog (party) was officially recognized by the Army in 32 CFR 591.451(c). Therein, the Army conceded that its exclusive agent was powerless to resist the blandishments of the agent's lawyer:

> "While the contracting officer is the exclusive agent of the Government for entering into and administering contracts and is responsible for coordinating his team of advisers, he is not completely free to evaluate the legal advice of his legal counsel and act in a manner inconsistent therewith".

The important conclusion regarding expense awards is that no party has much control over the expenses its lawyers incur during litigation. The lawyers decide, for and by themselves, what to spend and what to do. Moreover, because they operate in an adversary system, lawyers must think of and prepare for "possible responses"; because they don't actually get every response they anticipated doesn't make the planning less compensible. As Judge Justice remarked in Ruiz:

> "Defendants confuse this principle with an assertion that has no grounding * * * : that plaintiff's counsel have an obligation to perform legal work in a minimally competent way. Such a claim is idle; indeed, were plaintiff's counsel to have adhered to such a pernicious doctrine, they would have done a serious disservice to the interests of the plaintiff class. As in any complex federal litigation, plaintiffs have a right to expect from counsel the fullest possible effort, in the vigorous prosecution of the claims of the class." Ruiz v Estelle, 553 F Supp at 588.

Those preparations for responses that never materialize complicate the audit. Moreover, the auditor will encounter many other problems. First, the relationship between the "attorney" and "government" needs defining. Obviously, a prevailing "private attorney general" acted as "attorney" for the government: there is no privity that will be invaded when his "subcontractor" attorney's books are examined. But for all other cases of prevailing parties, the concept of "attorney-client privilege" presents a barrier to a full disclosure. Second, it is not clear what rate should be used for time spent on the audit itself. While perhaps not as demanding as trial time, if the attorney's attention is required he may be distracted from other fee-generating work. Third, the standard to assess the attorney's intellectual processes is not well-defined. Moreover, things always look different by hindsight. Fourth, overhead allocation (by auditing every case in the office) could lead to a massive invasion of other privileged relationships.

Nevertheless, I believe it should be possible by a suitable audit of the books to show whether the attorney's profit margin or list of expenses is improper. If so, then upon discovering a violation the case can be referred for suitable prosecution, or recovery, or both, under 18 USC 1001 or under the enabling act.

CONSTITUTIONAL RIGHT TO BE COMPENSATED

To the extent litigation expenses on behalf of the government are expended by a party authorized to act as "private attorney general", the expenses constitute property appropriated for a public use. The 5th Amendment requires just compensation therefor:

> "nor be deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."

While the right to compensation may be constitutionally prescribed, the right to compensation by a court is not. Withdrawal of all remedies is not necessarily a repudiation of the sovereign's indebtedness. See, e.g, Lynch v US, 292 US 559, 579-583 (1934). However, once standing to sue is granted by the US, it would be difficult to withhold compensation therefor. See, e.g. Jacobs v US, 290 US 13 (1933).

To prevent compensation of a "private attorney general", the statute

would now have to prevent his "appointment" (i.e, deny "standing to sue"). Once suit is permitted, it is too late to avoid payment.

STANDING TO SUE

Standing to sue is not generally given. OMB might well examine current statutes to see if they are overly generous regarding "standing".

I believe "private attorney generals" can be beneficial, because by their horizontal control and by their expertise they contribute to the effective administration of government. Control of the lower administrative levels would be difficult without their influence. But if an abusive situation exists, then the particular statute that is offensive should be adjusted to counteract that abuse.

In this regard, the draft legislation singled out the environmental protection statutes as abusive because it was "too easy" to get an award even if a party did not prevail. Without addressing whether the statute is "easy", let me say that a proper response would be to restrict standing (perhaps require an injury in fact) rather than to try to withhold the fee after the act is done. In other words, the actual correction must be applied to the actual source of irritation to be effective.

On the other hand, OMB should monitor situations where agency action seems to draw considerable "private attorney general" litigators who effect substantial corrections. Such occurrences suggest that the agency is not operating cost-effectively.

SOVEREIGN IMMUNITY

Sovereign immunity generally means "freedom from involuntary suit"; it doesn't permit the government to rig justice in its favor if it consents to suit. In Chisholm v Georgia, 2 US (2 Dall.) 419 (1793), the Supreme Court in its infancy addressed the right of sovereignty in a United States court. While the sovereign in that case was a state (and therefore more sovereign than the US, at that time), nevertheless the Court demonstrated that when any sovereign agrees to be judged in a court of law it comes to bar as an equal party subservient to the court and to the law of the court, and not as the sovereign.

In Murray v Charming Betsey, 6 US (2 Cranch) 64 (1804); Little v Barreme, 6 US (2 Cranch) 170 (1804); Maley v Shattuck, 7 US (3 Cranch) 458 (1806); the Court decided that the Secretary of the Navy gave an unlawful order to the respective Navy Captains, and because they obeyed it the captains were personally liable for recovery, damages, interest, and attorney fees & other court costs. Moreover, that if the US was officially at fault, litigation expenses were assessable against the US. See, e.g, US v La Vengeance, 3 US (3 Dall.) 297 (1796); Maley v Shattuck, Id.

On account of the Chisholm and Brailsford cases, the states reacted by passing the 11th Amendment to insulate them from suit. However, notice that nowhere in the 11th Amendment did the states propose exempting the US as well. The failure of "powerful" sovereigns to exempt the central "weak" government is very noteworthy.

5th AND 14th AMENDMENTS

The early cases cited establish the setting in which the 5th Amendment was enacted. They prove the proposition that litigation expenses were regarded at that time as "property"; they were compensible when "taken" by suit. However, they were not regarded as "damages". They were not to be included with the damages, but with the costs. That was because of various computations that courts required of the various sums collected. See, e.g, Rule VII (5 US xvii) of the Supreme Court, tying the fee bills to the "English" system.

After 1853, when the "American Rule" (10 STAT 161) was enacted, Rule VII became obsolete. Unquestionably Congress by statute could prevent fee awards between parties unless otherwise the parties made nonstatutory agreements. It could also forgive the attorney fees due the US if it won. But the right to compensation from the US for attorney fees, as a consequence of a "taking", is something entirely different. Eminent domain cases provide no authority because there the party is usually resisting the taking, not asking for just compensation.

In Alyeska the Court observed, very quietly, that of all parties eligible for compensation the winner over the US is probably most deserving. It then used that order to decide that private losers would not be assessed sua sponte until at least the US owned up to its debts, which at the time it was not. The Court's logic presumably was based on the "taking" clause.

The states' exemption from fees was demolished in Hutto v Finney, 437 US 678 (1978), after the US had revised the absolute bar on fee awards. In Hutto, it was pronounced absurd for a sovereign to claim immunity from attorney fees. The link traced by the Court was through the 14th Amendment. Thus the Court invoked the "taking" clause of the 5th Amendment, via the "equal protection" clause of the 14th Amendment. The sovereignty defense to suit was disallowed. But by the disallowance, the Court also implicitly swept away the analogous defense if raised by the US itself. Moreover, when Hutto was extended in Maher v Gagne, 448 US 122 (1980) to all "takings", statutory as well as constitutional, the immunity defense became totally obsolete as against litigation expenses.

This line of cases is substantial evidence that state and federal acts should be treated in pari passu with respect to litigation expenses.

42 USC 1983

I suggest that 42 USC 1983 should be amended to read "any government or agency thereof" (thereby dropping the words "state or territory or the District of Columbia"). Amendment of 1983 would also quiet Bivens actions. Presently there is a desire on the Administration's part to make Bivens cases statutory. The opposition would be mollified by the change to 1983.

However, I suggest that a plaintiff should be explicitly required to show a linkage, enmeshing the government or agency officially (sanctioning the person's unlawful behavior), before the complaint may lie in respondeat superior. Without the linkage the complaint should lie only against the

persons in their private capacities. See, e.g. Parratt v Taylor, 451 US 527, n.3 (1981).

But I believe that if the government or agency participates actively in the defense of the injuring person or persons (except for initial opposition to respondeat superior), then the participation per se admits of the linkage that will permit the government to be joined as a party liable.

42 USC 1988

I suggest that 42 USC 1988 should be amended to permit the award of attorney fees "in any action or proceeding to enforce a provision of the constitution of any government, or Chapters 5 & 7 of Title 5, or any section permitting a private cause of action if it or another section permits a similar public cause of action, or sections (etc)". Such language would reconcile 24 USC 2412(b) with 42 USC 1988, as intended by the colloquy recorded at page 100, and the drafting change recorded at pages 287 & 299, of 96th House Judiciary Hearings, Serial No 62 (1981). That concept was explained in Lauritzen v Secretary of Navy, 546 F Supp 1221 (1982). Due to the present convolutions between the two statutes, the linkage is not crystal clear. The amendment is designed to smooth out the interlock.

Lastly, 42 USC 1988 should be amended to add: "To receive an award under this section, prior to filing suit a prevailing plaintiff must have given notice of the alleged injury to the losing party; and a suitable time thereafter, to enable a cure to be taken, must have elapsed before the suit was filed, or else the fee award may be adjusted to compensate therefor at the discretion of the court".

\- - -

With these procedural and legislative adjustments, I believe the responses to future "civil rights" actions against any governmental body will be simple and quick: (1) if the action is unwarranted or in the wrong jurisdiction it will be immediately dismissed, or (2) if the action is maintainable, the body will have had prior notice and will supply a quick "fix" rather than mounting a "boilerplate" defense. I believe these responses are salutary and will promote the public's interest better than is possible now.

But this letter is intended merely to begin a dialogue with OMB on this subject. I would be pleased to help you all I can.

Very truly yours,

J. H. McQuiston

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Honorable Charles Grassley
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Washington, D.C. 20510

May 18, 1983

Dear Senator Grassley:

REFERENCE: S. 775 Government Accountability Act

My research on EAJA naturally included analyses of many Bivens cases. For example, Lauritzen v Secretary of Navy, 546 F Supp 1221 (C.D.Cal 1982), appeal No 82-6020 (9 Cir), may prove to be the seminal case of its kind if finally upheld as tying EAJA to "official" Bivens cases.

Consequently, I have followed the hearings on HR24 and S.1775 (97 Cong) and on H R 595 (98 Cong), and I have communicated with OMB regarding the draft proposal it is preparing. See enclosure. But a fundamental presumption of the witnesses to these hearings disturbed me. I believe it also disturbs Congress:

> Can a substantive, intentional, Constitutional violation by a federal official be trivialized to the level of an accidental, unpremeditated injury?

The FTCA does not now condone premeditated and unconstitutional acts of injury by any official. Section 2680(h) specifically disowns any attempt at respondeat superior. It therefore complements the Civil Rights Act, which makes it a serious federal crime for any person to violate a substantive Constitutional right of another. See 18 USC 241 & 242.

Nevertheless, this Accountability Act S.775 intends to accept such acts as agency policy, therefor to immunize the officials who actually did the violating for the agency. Consequently, S.775 would tacitly permit an agency to fire any employee who refused its order to perform an unconstitutional act. Thus S.775 will give the ultimate responsibility for every unconstitutional act of the officials to the President alone, who may only be impeached. See Nixon v Fitzgerald, 50 LW 4797 (1982). I believe such a monolithic government would prove unmanageable.

Please don't forget that S.775 also will affect habeas corpus actions involving alleged crimes of federal employees, because such habeas actions are civil. Presently federal employees are immune from local laws, if they act in their "official" capacities. In Los Angeles, it is routine for the Attorney General to extricate them by alleging that, whatever they did, it was done "officially". But in so doing, the Attorney General also admits for the agency a case of respondeat superior for any Bivens action that may follow.

I believe the Committees may mistakenly assume that the Attorney General will become selective in throwing the cloak of officialdom, after S.775 becomes law. But it would be foolhardy for him not to declare every employee act official, regardless of what it was. Not only will that tactic throttle suits, but also it will give the Attorney General absolute power to control everyone and every document and thing. Moreover, to "abandon" an official might give rise to another suit.

To break this unholy chain I believe the Attorney General should not be permitted to abort a civil action against an individual by admitting to respondeat superior. If the agency actually conspired with an official to deprive someone of a substantive civil right, then the action properly lies against both. The court will then retain the power to apportion damages between the agency and the official. See People Organized v Thompson, et al, 559 F Supp 54 (N.D.Ill 1983); Smith v Wade, 51 LW 4407 (1983). Settlement may occur between the injured party and the agency without compromising the case between the party and the official. Thus the stated aim of S.775 would be fulfilled without granting any immunity to the official that acted unconstitutionally.

But for example of an action under S.775 as now constituted, let us remember that a substantive Constitutional violation very probably will draw a charge by the local police. Thereafter, the Attorney General will certainly file a petition for habeas corpus in federal court, to block the local police. Then, before the court reacts, the Attorney General will declare that the employee acted in an official capacity when the unconstitutional act occurred. That declaration alone will be powerful enough under S.775 to quash the local criminal action against the official. Thus the "inconvenience" of further federal action, civil or criminal, will be eliminated by the "civil" action under S.775. Also, the official will obtain a statement of position from the Attorney General guaranteeing him immunity from any possible disciplinary action by the agency, so the agency will not be required to do so. I believe this is not what Congress intends to have happen, but it surely will.

So you will have an example of present practice in this regard, I am also enclosing pleadings from a current Los Angeles case. The arguments in the DOJ petition constitute: (1) a basis for complete exoneration of the officials if any disciplinary action were brought, and (2) an assertion that, whatever the officials did, the acts were official. Please see II and V of the petition. Please note that they present to the court the same reasons advanced at the Committee hearings for immunizing officials from acts such as stated in the People's answer.

Fortunately, in this case the official's gun did not discharge. As the cites make clear, if there had been a death it would not have mattered.

The magistrate conducted 6 days of hearing testimony on the petition, and thereafter issued findings. The Attorney General then objected to the findings on various grounds. However, under S.775 the Attorney General would not have had to put up with having a magistrate find against him, because he alone would declare that, essentially, a decision by magistrate is unnecessary.

Enclosed are: (1) the habeas petition(3pp),(2) the People's answer (10 pp) and (3) the magistrate's findings and conclusions (pp 27-44). Please also note that 18 USC 241 would probably apply.

Starting with Murray v Charming Betsey, 6 US (2 Cranch) 170 (1804), there have been numerous successful Bivens actions against federal officers who acted unconstitutionally. If also there have been frivolous filings, there were always common-law remedies available to punish frivolity. But cases cited to support the need for S.775 in the hearings just won't stand up under scrutiny. I hope the upcoming witnesses will be able to supply a better foundation both for and against S.775.

First, most of them were decided by juries and upheld on appeal. It

would be a radical act if Congress repudiated both jury trial and appellate adjudication. Contrasting with them are cases like Bivens actions that the Court of Claims has decided in a very shoddy manner without a jury.

Second, Bivens actions uniformly raised the officials' consciousness of the rights of others, and their future attention to them, according to the testimony received. That was one deterrent factor that the courts intended.

Third, the cases that won were uniformly egregious. That is undoubtedly why the juries made their awards. You have only heard from one side of the various parties in the cases. Because of EAJA, I have had to study the pleadings of both sides, as well as the results. I can't fault the juries' decisions.

Fourth, what the officials ask of Congress is simply what anyone who has ever sued or has been sued would ask: To decide for them and to forget the suit. Yet, Congress won't let anyone else escape liability for an intentional violation of someone's substantive Constitutional right. What, then, makes a mere federal employee so "elite" in this country of equals?

One virtue of S.1080 is its requirement to solicit "alternative methods to accomplish the rule making that are more effective or less burdensome". I believe it's only fair for me to suggest a constructive alternative to S.775, so I shall submit something for the May 26 hearing. But with a discharge date of June 1, I don't expect anything from S.775 beyond continuing the status quo. That is good enough right now, as it was in 1804.

Very truly yours,

J. H. McQuiston

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Encl ltr McQ to OMB 3/29
Pleadings Morgan & Swanson

c: (less encl) Lynda Nersesian, Esq

orig

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FILED

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IN THE UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF THE PETITION OF HENRY BRADFORD MORGAN AND STEPHEN MICHAEL SWANSON, FOR A WRIT OF HABEAS CORPUS.	No. CV 83 0661 R (G) Petition for Writ of Habeas Corpus; Declarations; Order

PETITION OF HENRY BRADFORD MORGAN

AND STEPHEN MICHAEL SWANSON

Your petitioners, Henry Bradford Morgan and Stephen Michael Swanson, allege as follows:

I. That they are now, and were at all relevant times herein, employed as Special Agents of the Drug Enforcement Administration, United States Department of Justice.

DWM:daf:ls

II. That the performance of their official duties is being unlawfully delayed, hindered, and interfered with, and they are unlawfully being restrained of their liberty, by Ira Reiner, Los Angeles City Attorney, and the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in that they are being required to appear in said court and stand trial for alleged criminal conduct which arose from acts authorized by the laws of the United States and which were proper, reasonable, and necessary in the performance of their official duties as agents of the United States.

III. That the petitioners further allege the facts set forth in their attached declarations and the attached Memorandum of Points and Authorities which is incorporated by reference herein.

IV. That petitioners have demurred to and moved to dismiss said complaint which motions were denied by said Municipal Court on December 28, 1982, and petitioners will be required to appear and stand trial in said Municipal Court on February 28, 1983, unless the relief prayed for herein is granted.

V. That petitioners will be irreparably injured if forced to stand trial on the aforesaid criminal complaint, for the reason that the alleged criminal acts arose while they were properly carrying out the duties of their office, and are not, therefore, subject to prosecution by the State of California. Unless this petition is granted, petitioners will be forced to stand trial in violation of federal law, yet both the petitioners, and the United States will incurr the expense of their defense and damage to the conduct of the respective affairs of their office, whether petitioners are acquitted or convicted, by virtue of the necessary

preparation for, and the time spent in, what apparently will be a protracted trial. Moreover, your petitioners believe that, unless this petition is granted, all federal law enforcement agents will become reluctant to fully and faithfully discharge their proper investigative and law enforcement duties, for fear of being unlawfully prosecuted by local municipalities which may disagree with the manner and methods used by the federal agents, thereby resulting in detriment to the perogatives of the federal system.

VI. That no other application for writ has heretofore been made to any other court or judge.

PRAYER

WHEREFORE, Henry Bradford Morgan and Stephen Michael Swanson, your petitioners, pray that a Writ of Habeas Corpus issue out of this Court; that respondents the City Attorney of Los Angeles and the Los Angeles Municipal Court be required to appear and show good cause why petitioners should not be ordered discharged, and the aforesaid charges against petitioners dismissed and terminated; that respondent Municipal Court be ordered to stay all further proceedings in petitioners' criminal case pending in that court; and that respondents abide by the Orders of this Court.

DATED: 2/3/83

Henry Bradford Morgan

DATED: 2/1/83

Stephen Michael Swanson

IRA REINER, City Attorney
JACK L. BROWN, Deputy City Attorney
Supervisor, Appellate Section
JOHN T. RAFFERTY, Deputy City Attorney
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Attorneys for Respondent
PEOPLE OF THE STATE OF CALIFORNIA

FILED
MAR - 4 1983
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF THE PETITION OF,	CASE NO. CV 83 0664 R(G)
HENRY BRADFORD MORGAN AND STEPHEN MICHAEL SWANSON	ANSWER/RETURN TO ORDER TO SHOW CAUSE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS; EXHIBITS
FOR A WRIT OF HABEAS CORPUS.	

The People of the State of California, respondent in the above-entitled matter, by and through their attorney, Ira Reiner, Los Angeles City Attorney, submit the following answer/return to the Order to Show Cause and allege as follows:

1. Henry Bradford Morgan and Stephen Michael Swanson (hereinafter variously identified as "Morgan", "Swanson", or "defendants") are the named defendants in a misdemeanor complaint duly filed by the People of the State of California in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. The docket number of the criminal case based upon that complaint is 31236506.

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2. Count I of that complaint alleges that on September 1, 1982, Morgan and Swanson did wilfully and unlawfully violate the personal liberty of Roman Tarasink in violation of California Penal Code section 236.

3. Count II of the complaint alleges as a separate and second cause of action that Morgan, on September 1, 1982, wilfully and unlawfully and not in self-defense drew and exhibited a firearm and a deadly weapon, to wit, a gun, in a rude and angry and threatening manner in the presence of another person in violation of California Penal Code section 417.

4. Count III of the complaint alleges as a separate and third cause of action that Morgan and Swanson, on September 1, 1982, wilfully and unlawfully used force and violence upon the person of Roman Tarasink in violation of California Penal Code section 242.

5. Count IV of the complaint alleges as a separate and fourth cause of action that Swanson, on September 1, 1982, did wilfully and unlawfully use force and violence upon the person of Ravida Mingaleeva in violation of California Penal Code section 242.

6. Count V of the complaint alleges as a separate and fifth cause of action that Morgan, on September 1, 1982, did wilfully and unlawfully drive a vehicle while being under the influence of an alcoholic beverage, and a drug, and under the

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combined influence of an alcoholic beverage and a drug in violation of California Vehicle Code section 23152a.

7. Count VI of the complaint alleges as a separate and sixth cause of action that Morgan and Swanson, on September 1, 1982, did wilfully and unlawfully commit an assault upon the person of Roman Tarasink, with a deadly weapon and instrument and by means of force likely to produce great bodily injury in violation of California Penal Code section 245.

8. Count VII of the complaint alleges as a separate and seventh cause of action that Morgan and Swanson, on September 1, 1982, did wilfully and unlawfully use force and violence upon the person of Roman Tarasink in violation of California Penal Code section 242.

9. Defendants voluntarily submitted themselves to the jurisdiction of the Municipal Court of the Los Angeles Judicial District and, following various procedures not here relevant, entered pleas of not guilty to all charges on or about December 28, 1982.

10. The factual basis for the above mentioned misdemeanor complaint is contained in several documents which are attached to this answer/return as Exhibits 1, 2 and 3 and incorporated herein by reference as though they were fully set out within. These include a Preliminary Investigation Report number DR 82-700-844 prepared by Los Angeles Police Officers William Young and Gary

Lish, Exhibit 1; a Driving-Under-The-Influence-Arrest Report number DR 82-337-604 prepared by Los Angeles Police Officer William McClellan, Exhibit 2; and a Follow Up Investigation Report number DR 82-700-944 prepared by Los Angeles Police Detectives Carranza and Hopson, Exhibit 3.

11. Attached to this answer/return as Exhibits 4, 5, 6, 7, 8 and 9 and incorporated herein by reference as though they were fully set out within are declarations executed under penalty of perjury of Roman Tarasink, Ravida Mingaleeva, William McClellan, William Young, Gary Lish, and Roger Jackson.

12. The above-referenced documents and declarations clearly establish the following:

A. On September 1, 1982, at approximately 6:00 p.m. Morgan was driving an automobile in which Swanson was the passenger in the vicinity of 709 North Hill Street in the City of Los Angeles which collided with a second automobile which was parked at the curb at that location. At the time of this collison, and for some time thereafter, Morgan was under the influence of an alcoholic beverage to the extent that his physical and mental abilities were impaired so that he did not have the ability to drive that vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances.

B. The automobile with which Morgan collided was a 1973 Mercedes owned by Roman Tarasink and his wife, Ravida Mingaleeva.

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Mingaleeva was seated in the front passenger seat of the Mercedes at the time of the collison; Tarasink was standing on the sidewalk leaning into the back seat of the Mercedes at the time.

C. Following the collison, Tarasink approached Morgan for the purpose of exchanging identification. Morgan refused to provide Tarasink with his identification and became extremely belligerent. Morgan and Swanson both got out of their automobile and Morgan grabbed Tarasink by a gold chain which Tarasink wore around his neck, causing the chain to break.

D. Both Morgan and Swanson then struck Tarasink on his body while making rude and insulting comments.

E. Mingaleeva approached the defendants and demanded that they stop. Swanson then struck Mingaleeva in the abdomen with his elbow.

F. Mingaleeva and Tarasink both formed the opinion that defendants were drunk.

G. At no time during the above-described incidents were either Mingaleeva or Tarasink armed; at no time did they physically threaten the defendants.

H. After the above-described incidents, Mingaleeva and Tarasink went to Quong Phat Jewelry Store, where they were known, obtained admittance, and called the Los Angeles Police.

I. A short time after Tarasink and Mingaleeva had entered the jewelry store, defendants approached the locked door of the jewelry store and, displaying some sort of official identification, demanded admittance, which was granted.

J. When Morgan entered the store, he took a pistol and waved it at Tarasink. Morgan then grabbed Tarasink by the shirt and pushed him against a counter.

K. Morgan placed the barrel of his pistol against Tarasink's head and demanded that Tarasink get down on his knees.

L. Morgan demanded that Tarasink forget about the incident outside the store.

M. Tarasink told Morgan that the police had been called, whereupon Morgan for the first time identified himself as a federal officer.

N. Morgan then attempted to coerce Tarasink into forgetting about the incident by threatening that he, Morgan, or one of his friends would plant drugs in Tarasink's car.

O. Morgan then twisted Tarasink's arm behind his back and, placing the barrel of the pistol into Tarasink's back, forced him to leave the jewelry store.

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P. Swanson was present with Morgan at all times described above and actively aided and encouraged Morgan in his conduct.

Q. Officers Lish and Young of the Los Angeles Police Department went to the scene pursuant to a radio call they had received and conducted an investigation.

R. Morgan told the two officers that Tarasink was armed with a pistol concealed in his waistband.

S. Officers Lish and Young conducted a thorough search of Tarasink, Mingaleeva, their automobile, and the jewelry store and did not locate a gun.

T. Officers Lish and Young each formed the opinion that Morgan and Swanson were under the influence of alcohol.

U. In the early stages of their investigation, Officers Lish and Young were told by defendants that they, defendants, had intended to go to the Los Angeles Police Academy in nearby Elysian Park to have some drinks at a by-weekly gathering of police officers on their payday. Defendants further told the officers that they had stopped at the location to go to the Velvet Turtle restaurant for some drinks.

V. Both defendants attempted to discourage Lish and Young from pursuing the investigation on the basis that all four were involved in law enforcement and should help each other.

W. Only after the investigation had been on-going for a considerable period of time did defendants first mention to Lish and Young that their purpose in going to the Velvet Turtle was to meet an anonymous informant.

X. During the course of the investigation, Swanson made at least two visits to the Velvet Turtle.

Y. During the course of the investigation, Swanson continually attempted to interfere with the investigation being conducted by Lish and Young.

Z. Sergeant Roger Jackson arrived at the scene to supervise Lish and Young and, after having conversation with the defendants, formed the opinion that both of them were under the influence of alcohol.

AA. Sergeant Jackson determined that the defendants and Tarasink and Mingaleeva should all be brought to the police station to complete the investigation.

BB. Morgan agreed to go to the station but Swanson belligerently refused.

CC. Sergeant Jackson at that time believed that he did not have probable cause to arrest Swanson, and thus allowed him to remain at the scene.

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DD. Officer William McClellan, a Los Angeles Police Officer assigned to Central Traffic Division, made observations of Morgan's physical and mental state and, in addition, administered certain tests of balance and coordination to Morgan at Parker Arrest Bureau.

EE. Based upon his observations and the results of these tests, Officer McClellan formed the opinion that, at 8:00 p.m. on September 1, 1982, Morgan was under the influence of an intoxicant and unable to safely operate a motor vehicle.

FF. Morgan was then advised of his obligation pursuant to California Vehicle Code section 13353 to submit to a chemical test of the blood alcohol level in his body. He refused to take any such test.

13. The facts related in subparagraphs A through FF constitute a prima facie showing that defendants committed the acts alleged in the seven counts of criminal complaint number 31236506.

14. At no time during the incident described in subparagraphs A through FF were defendants acting within the course and scope of their employment as officers and agents of the United States Government.

15. At all times during the incidents described in subparagraphs A through FF, defendants, and each of them, were acting wantonly and recklessly and with criminal intent.

16. Defendants, and each of them, are now in the lawful constructive custody of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California.

WHEREFORE, respondent prays:

1. That the order to show cause be discharged;

2. That the petitions for a writ of habeas corpus filed by defendants, and each of them, be denied;

3. That defendants, and each of them, be remanded to the Municipal Court of the Los Angeles Judicial District for trial;

4. That the order staying the criminal proceedings in the Municipal Court be lifted, and;

5. For such other relief as this Court may deem appropriate.

DATED: March 4, 1983

Respectfully submitted,

IRA REINER, City Attorney
JACK L. BROWN, Deputy City Attorney
Supervisor, Appellate Section

By _____
ARTHUR B. WALSH
Deputy City Attorney

Attorneys for Respondent
PEOPLE OF THE STATE OF CALIFORNIA
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THE EVIDENCE

It is impossible to describe the evidence in this case as other than hotly disputed. Some material facts are agreed upon by the parties. A summary of the status of possibly critical issues of fact is here provided.

1. Both petitioners were, on September 1, 1982, employed as DEA agents.

Undisputed.

2. Both worked in the DEA office at the U.S. Courthouse on that date.

Undisputed.

3. The two agents have worked together, but although petitioner Swanson is a supervisor, and superior in rank to petitioner Morgan, he does not supervise petitioner Morgan's work.

Undisputed.

4. On September 1, 1982, prior to the incident, petitioners Morgan and Swanson had lunch together between 2:30 P.M. and 4:00 P.M. (or thereabouts) at Taix Restaurant.

Undisputed.

5. During lunch each had two drinks.

It is undisputed that each had at least two drinks, but the agents stated they drank only wine, and the bulk of the evidence as to their sobriety, or lack of it, is inconsistent with the petitioners having drunk no intoxicating beverages other

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than two glasses of wine each, and at a time approximately two hours or more prior to the beginning of the events underlying this case.

6. The agents left the courthouse in a government vehicle at about 5:30 P.M. on September 1, 1982, with petitioner Morgan driving and petitioner Swanson as the only passenger.

Undisputed.

7. The agents were enroute to meet an unknown anonymous phone caller who had told petitioner Morgan he had information about major drug activity, and would talk to him at the Velvet Turtle Restaurant on North Hill Street, Los Angeles.

Disputed by testimony of two police officers who investigated the events at the scene and stated that one or more of the petitioners told them that they were enroute to the Velvet Turtle to have a couple of drinks, and thereafter to a bar at the Police Academy.

8. Roman Tarasiuk was parked at the curb in front of 709 North Hill Street, across from the Velvet Turtle, when the petitioners arrived and Ravida Mingaleeva was a passenger.

Undisputed.

9. Roman Tarasiuk was at the location for the purpose of attempting to sell gold bullion in his possession to a jeweler or jewelers in the Chinatown area, particularly Quang Phat.

Disputed -- but no evidence to contrary except possible denial by son of jewelry store owner that he even bought gold bullion except from Hong Kong.

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10. Upon arrival at the vicinity of 709 North Hill Street, petitioner Morgan parked his government car in the red curb zone directly in front of the entrance to the shopping mall, Asian Towers, at 709 North Hill Street.

Undisputed.

11. In parking the car, petitioner backed his car into the front of the Roman Tarasiuk car, once or twice, at a low speed.

Undisputed.

12. There was little or no damage visible on the government vehicle.

Undisputed.

13. There was minor front-end damage on the Tarasiuk vehicle, immediately after the impact(s).

Undisputed.

14. Some or all of the front-end damage to the Tarasiuk vehicle was caused by the impact(s).

Disputed --- there was evidence that the damage appeared to be old, that there was no debris or dislodged dirt seen in the street where the cars came together, that the impact(s) involved only bumpers, that there was little noise at impact(s); on the other hand, there was evidence that the impact was hard enough to move the Tarasiuk vehicle backward a couple of feet, and that the Tarasiuk vehicle front end was undamaged before the impact(s).

15. Tarasiuk repeatedly requested petitioner Morgan to identify himself, and offered his own driver's license, but

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petitioner Morgan refused to provide identification.

Disputed.

16. No driver's license information was actually exchanged.

Undisputed.

17. Tarasiuk told petitioner Morgan immediately after the accident that his (Tarasiuk's) vehicle was damaged.

Undisputed.

18. A shouting argument took place on the sidewalk adjacent to the parked vehicles, in which all four (petitioners, Tarasiuk and Mingaleeva, particularly the first three) participated.

Undisputed.

19. The initial phase of the altercation lasted at least 2-3 minutes, and possibly longer.

Undisputed.

20. The altercation attracted considerable attention from a parking lot supervisor and patrons across the street in the Velvet Turtle parking lot.

Undisputed.

21. Petitioners threatened to harm Tarasiuk if he persisted in his attempt to get petitioner Morgan's identification, during the initial phase.

Disputed.

22. Petitioner Morgan choked Tarasiuk, broke a gold chain around his neck, and punched him in the body several times during the initial phase.

Disputed.

23. Petitioner Swanson struck Tarasiuk several blows in the body, in the initial phase.

Disputed.

24. Mingaleeva attempted to protect Tarasiuk from further assault by stepping between petitioners and Tarasiuk, and preventing Tarasiuk from defending himself.

Disputed.

25. Tarasiuk stepped back from petitioner Morgan, pulled back his jacket, and displayed an automatic handgun in the waistband of his trousers.

Disputed.

26. Tarasiuk did not touch the handgun or move his hand toward it at such time.

Undisputed.

27. Tarasiuk did not make any statement or comment on the handgun, or make any verbal threats, before, during or after the alleged display.

Undisputed.

28. Prior to the alleged display, neither petitioner had identified himself in any manner, shown a badge, or claimed to be a DEA agent, government agent, or peace officer.

Undisputed.

29. Immediately following the alleged display, petitioner Morgan told Tarasiuk verbally he was a federal agent.

Disputed.

30. Petitioner Morgan did not show a badge or other identification to Tarasiuk at such time.

Undisputed.

31. Petitioner Swanson saw Tarasiuk brush his coat back at the time of the alleged display.

Disputed.

32. Petitioner Swanson never saw a handgun in Tarasiuk's possession.

Undisputed.

33. Immediately after the alleged display, Tarasiuk and Mingaleeva left the sidewalk area and walked into the shopping mall.

Undisputed.

34. Mingaleeva and Tarasiuk proceeded to the Quang Phat jewelry store, toward the rear of the mall, and were admitted through the locked front door, operated by an electric device.

Undisputed.

35. Immediately upon entering the store, Tarasiuk asked to use the telephone to call the police, and made a phone call, reporting a traffic accident followed by an altercation with two men who assaulted and threatened him; he stated he had gold with him, that he was afraid, and requested assistance.

Undisputed.

36. Petitioner Morgan told petitioner Swanson, shortly after Mingaleeva and Tarasiuk left the sidewalk area, that Tarasiuk had displayed a gun to him, and that he wanted to go after Tarasiuk and arrest him.

Undisputed.

37. Petitioner Swanson believed petitioner Morgan's statement that petitioner Morgan had displayed a handgun in his waistband.

Undisputed.

38. Petitioner Morgan had a handgun in an attache case in the trunk of the government car when he arrived at the 709 North Hill Street location, and opened the trunk and removed it from the attache case to his person after Tarasiuk and Mingaleeva walked into the mall.

Undisputed.

40. Neither petitioner at any time made any radio or phone call, or personally summoned the police to the scene.

Undisputed.

41. Petitioner Swanson at a late point in time in the events at the scene made or began to make one or more requests to a clerk at one of the other mall stores to call the police but did not follow through.

Undisputed.

42. While Mingaleeva and Tarasiuk were in or about the jewelry store petitioners searched for them for several minutes.

Undisputed.

43. Petitioners saw Tarasiuk in the jewelry store, knocked on the door, and petitioner Morgan displayed his badge through the glass window.

Undisputed.

44. The jeweler caused the electric lock to open, and petitioner Morgan entered the store.

Undisputed.

45. Petitioner Morgan approached Tarasiuk, and had his hand on his gun as he did so.

Undisputed.

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46. Petitioner Morgan pointed his gun at Tarasiuk generally, and then at his head specifically.

Disputed.

47. Petitioner Morgan searched Tarasiuk.

Disputed as to extent.

There is a dispute as to whether he gave him only a pat-down in search in the waistband area, or a thorough search, including interiors of pockets.

48. Petitioner Morgan asked Tarasiuk "where he had put his gun."

Undisputed.

49. No gun was found on Tarasiuk or in the vicinity, although a quick search was made by petitioner Morgan and a more thorough search of the area by police subsequently.

Undisputed.

50. The jewelry store clerk asked petitioner Morgan and Tarasiuk to leave the store.

Undisputed.

51. Both petitioners, Mingaleeva and Tarasiuk walked out of the mall and returned to the sidewalk area.

Undisputed.

52. Upon arrival of LAPD officers Lish and Young a few minutes later, petitioner Swanson immediately identified himself and petitioner Morgan as federal agents and stated that Tarasiuk had a gun.

Undisputed.

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53. The two LAPD officers conducted an investigation at the scene.

Undisputed.

54. The two LAPD officers summoned Sgt. Roger Jackson, LAPD, to the scene for assistance in deciding how to handle the situation.

Undisputed.

55. Petitioner Morgan told the police Tarasiuk had threatened him by displaying a gun.

Undisputed.

56. Tarasiuk and Mingaleeva told police that petitioners had been rude, insulting and assaulted them physically.

Undisputed.

57. All three LAPD officers formed the opinion that both petitioners had been drinking alcoholic beverages and were possibly under the influence of alcohol.

Undisputed.

58. Petitioner Morgan voluntarily accompanied the LAPD officers to the Central Police Station.

Undisputed.

59. Petitioner Swanson refused the request of the officers to accompany them to the police station.

Undisputed.

60. Petitioner Morgan voluntarily took a standard LAPD agility and balance test, used to determine whether a suspect is under the influence of alcohol, at between 7:00 and 8:00 P.M., more or less, at Parker Center.

Undisputed.

61. Petitioner Morgan did not, in the opinion of the officer (McClellan) administering the test, satisfactorily perform the tests, and he so told petitioner Morgan.

Undisputed.

62. Petitioner Morgan was not booked or arrested but was subsequently released to a DEA supervisor called to the police station.

Undisputed.

63. Police reports stating that both petitioners had been drinking, and exhibited several signs of intoxication were prepared by the officers within a few hours after the release of petitioner Morgan.

Undisputed.

64. None of the officers who contacted petitioners on September 1, 1983, knew petitioners, or knew Tarasiuk, or Mingaleeva, or had any knowledge of any prior dealings of Tarasiuk with the LAPD, prior to the filing of police reports.

Undisputed.

CONCLUSIONS

It is concluded that the state prosecution of petitioner Morgan for driving under the influence of alcohol (Count 5) does not fall within the Neagle-Drury line of cases. First, the facts are heavily disputed as to whether Morgan was under the influence of alcohol when he drove. Second, whether the car was being driven in the course of petitioners carrying out duties imposed by their federal status is also seriously open to dispute.

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Furthermore, even if the driving by petitioner Morgan was in the course of duty, there is no contention that he imbibed intoxicating beverages as part of his duties (a practice he testified was sometimes required when operating undercover). Thus it can hardly be said that driving while under the influence was a "necessary and proper" manner in which to perform his duties, at least in the absence of an emergency situation (which was not shown or claimed here). Such conduct would not, even under the circumstances claimed by petitioners, have been "reasonable," nor could petitioners have honestly believed that such conduct was justified.

Hence the prosecution of petitioner Morgan on this count (Count 5) should not be prevented, as the state action in no way constitutes a review of the exercise of federal authority. Clifton v. Cox, supra, does not teach otherwise.

Counts 3 and 7 each charge both petitioners with use of force and violence on Roman Tarasiuk. It is assumed that one count relates to events prior to Tarasiuk and Mingaleeva leaving the sidewalk scene to enter the mall, the other to the conduct of petitioners after the petitioners pursued Tarasiuk to the jewelry store (although there was no evidence of any use of force or violence by petitioner Swanson personally against Tarasiuk in the second episode). The two events, however, need to be analyzed separately. The first occurred prior to the alleged gun-display by Tarasiuk, the other later. As to the first, nothing more had transpired than that a heated verbal dispute had followed a minor traffic accident while petitioners were

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on their way to the Velvet Turtle. It cannot seriously be argued that the alleged striking and choking of Tarasiuk at that time was in any way part of the duties of petitioners. Tarasiuk was not a target of inquiry and was not physically interfering their proceeding to the Velvet Turtle (petitioners denied he requested to see a driver's license, but even if he did, that would have been an insignificant interruption in their pursuit of duty, in point of time and otherwise). It cannot therefore be seriously contended that beating or choking him (which both petitioners strongly deny) was either necessary or proper to performance of their duties (there was no claim that Tarasiuk had used or threatened to use force against petitioners prior to himself allegedly being struck and choked); it is hardly necessary here to consider whether the charged conduct was reasonable in the circumstances or whether the agents (unless far more strongly influenced by alcohol than they admit to) honestly and reasonably believed it was justified. Cf. Clifton v. Cox, supra.

The charge based on the alleged later use of force and violence, taking place in the jewelry store, requires further examination. Petitioner Morgan contends that Tarasiuk had intentionally displayed to petitioner Morgan a handgun in his waistband, looked down at the gun, while holding his jacket back to show the weapon, and then stared at petitioner Morgan's eyes; to petitioner Morgan that connoted a threat to use the gun against him. Petitioners argue that they then had a reasonable legal basis, as federal DEA agents, to arrest Tarasiuk for violation of 18 U.S.C. § 111, and that under California law, they were regarded

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as peace officers authorized to arrest for offenses committed in their presence, and therefore were authorized to arrest Tarasiuk on a state charge of carrying a concealed weapon (California Penal Code § 12025).

That claim falters as to both alleged crimes, when the facts testified to by petitioners (really only petitioner Morgan, since only he testified to have seen a gun in Tarasiuk's possession), taken at full face value, are matched up with the specified crimes.

18 U.S.C. §111 provides:

> "Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.
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> "Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The first problem is the requirement of § 111 that the suspect's conduct be done "forcibly." Some measure of "presently applied force" must be present, a threat of the future use of force alone being insufficient. United States v. Cunningham, 509 F.2d 961, 963 (D.C. Cir. 1975); United States v. Glover, 321 F.Supp. 591, 594 (E.D. Ark. 1970); United States v. Camp, 541 F.2d 737 (8th Cir. 1976). Was the alleged display of a handgun

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in Tarasiuk's waistband, without placing a hand on or near it, a forcible act, the felony described in § 111, punishable by ten years in prison? Unaccompanied by any verbal threat or menacing physical act, the mere display under the circumstances could not reasonably be construed as a threat of use of present force. At most, it constituted a threat to use the firearm if the petitioner (at that point unidentified as a federal agent or otherwise) attempted forcible action against Tarasiuk.

This legal circumstance is not necessarily defeative of petitioner's assertion of the right to arrest Tarasiuk. If he was performing a duty within the scope of his authority when the gun was displayed, and he reasonably believed in good faith that the display under those circumstances was a violation of § 111, his mistake in judgment does not remove his conduct from the exercise of such federal authority. In re Fair, supra; In re Waite, supra. The determination, however, as to whether he had a reasonable basis for believing Tarasiuk was in violation of § 111, and honestly and reasonably believed it, is based on heavily disputed facts, and is to be resolved by the state courts, except in the presence of "peculiar urgency." Drury, supra. Whether such urgency exists in this case will be discussed hereinafter. It is not open to controversy that if petitioners reasonably believed in good faith that Tarasiuk had displayed a gun to petitioner Morgan in such a way as to forcibly intimidate or assault him, they had authority to pursue and arrest Tarasiuk.

The second purported offense committed by Tarasiuk was, petitioners allege, to possess the firearm concealed upon his person.

The relevant state statute is California Penal Code § 12025(b): "Any person who carries concealed upon his or her person any pistol . . . without having a license to carry such firearm. . . is guilty of a misdemeanor. . . ."

Petitioner Morgan, even if he saw a handgun theretofore concealed on Tarasiuk's person, had no knowledge as to whether Tarasiuk was in possession of a license, nor did he inquire prior to pursuit of Tarasiuk. At the most, he had the right, under state law, to detain and make inquiry of Tarasiuk as to whether he was licensed. That, however, was not part of his authority as a federal DEA agent, and it is not logical to assume that the doctrine of Neagle and Drury, narrowly described to protect the enforcement of federal law against state infringement, is at all applicable.

Proceeding, therefore, on the assumption that seeking to arrest Tarasiuk for a § 111 violation was the only exercise of authority by petitioners which could be found to be federally sanctioned, the question then becomes whether the use of force and violence by petitioner Morgan against Tarasiuk in the store (which is controverted by petitioners) was within the scope of such authority. That requires a determination of whether it was necessary and proper, reasonable to the court, and reasonable in the mind of the agent under the circumstances as he saw them. Is this determination one to be made by the state criminal court or by this Court? If not heavily disputed, it might be found that it is a question to be resolved by the federal Court. In re Waite, supra. However, in Waite it was "clear beyond question"

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that the agent was there acting under the authority of the United States when the acts complained of were done. In Drury, the Supreme Court held that if there was a genuine conflict in evidence as to whether the complained-of act (the use of force and violence against Tarasiuk) was in the performance of federal duties, the federal court should not interdict state criminal proceedings except in cases of peculiar urgency.

The same analysis largely disposes of count 4 (force and violence by petitioner Swanson on Mingaleeva), which like the alleged sidewalk battery on Tarasiuk, preceded any display of a handgun by Tarasiuk.

Likewise Count 1 (violation of Tarasiuk's personal liberty), Count 2 (exhibiting a gun in a rude and threatening manner), and Count 6 (assault with a deadly weapon on Tarasiuk), all involve conduct by petitioners after the alleged firearm display; all relate to the federal authority of petitioners to apprehend and search Tarasiuk, and the evidence is in substantial conflict as to the facts upon which it can be determined whether the federal authority of petitioners extended to such acts, as well as whether the manner of performing them was beyond what was justifiable.

The Neagle-Drury line of cases therefore mandates that the prosecution of petitioners on each of the counts with which they are charged be allowed to proceed. Unlike those cases in which it was established (by lack of dispute, by clear preponderance of the evidence, or by evidence which came close to removing reasonable doubt) in the federal district court that the federal agents were being prosecuted for carrying out their duties under

federal law in a necessary and proper manner, here the evidence reveals seriously-controverted questions as to whether the agents were actually in the course of performing their federal duties, and as to whether their charged acts were necessary or proper, and they have failed to carry their burden of proof on those facts. Whether they will ultimately prevail in a trial determining guilt or innocence is a matter of conjecture, certainly there are substantial questions of credibility which will have to be weighed in that proceeding; nevertheless, it is not the function of this Court in this habeas corpus proceeding to adjudge questions of guilt or innocence, that being the function of the state criminal court [or, upon removal to the federal court under 28 U.S.C. § 1442, by the federal court trying the state charges].

Clifton is not to the contrary, since it was basic to the plurality opinion there that the necessity and propriety of the agent's conduct in the performance of his duty be evident "nnder any view of the facts," a circumstance which unhappily does not prevail in this case.

In addition, the added ground cited by the Clifton plurality as warranting issuance of the writ, that it could not be said that, on the record as a whole, viewing the facts and conflicting evidence in the light most favorable to the state, there existed no substantial evidence to support a finding that petitioners were acting outside the scope of their employment or that they employed means which they could not honestly consider reasonable in discharging their duties (cf. Clifton, supra, at 730), does not

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exist here.

Lastly, it cannot be found that there is a special urgency to the federal government in removing petitioners from the due course of standing trial on the state charges levied against them. The line of cases reserving the exercise of federal habeas corpus authority for exceptional circumstances, as epitomized by the Supreme Court in Drury, must be regarded as the law; petitioners have failed to prove that disposition of their state criminal cases will seriously interfere with the enforcement of the laws of the United States or with the operations of its government. Clifton, a Ninth Circuit case, does not otherwise mandate here; it must be regarded as restricted to its facts, i.e., that the required urgency may be found in the absence from their federal employment of federal agents when it is largely indisputable that the conduct for which they are prosecuted was clearly necessary and proper to the discharge of their duties in the carrying out of federal law. This is a case for observation of the Drury statement that the general rule in non-urgent cases is "to so exercise . . . discretion, in view of the delicate relation of the national and the state courts, as to refuse to interfere by writ of habeas corpus. . . ." Drury, supra at 921.

IT IS RECOMMENDED that the application for writ of habeas corpus be denied.

DATED: April 21, 1983.

RALPH J. GEFFEN
United States Magistrate

THE NATIONAL ASSOCIATION OF FEDERAL VETERINARIANS
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MAY 23 1983

May 19, 1983

Senate Judiciary Committee
Rm. 242, Dirksen Senate Office Bldg.
Subcommittee on Administrative
Practice and Procedures
U.S. Senate
Washington, DC 20510

Attn: Lynda Nersesian

Dear Ms. Nersesian:

It would be appreciated if these comments on the legislation to amend the Tort Claims Act would be placed in the hearing record.

The National Association of Federal Veterinarians has been the organized voice of federally employed veterinarians since it was founded in 1918. Our members are the publicly employed veterinarians in eight federal departments who supervise and help implement the entire U.S. meat and poultry inspection program, investigate and manage the control of infectious diseases of all food animals and poultry, evaluate and license all animal drugs and biologics, implement the animal welfare laws, conduct medical research on a myriad of human and animal health-related problems from cancer to new vaccines for contagious disease, and work to reduce the public health hazards of foodborne illneses, animal diseases and environmental contaminants. Our members are in a great many ways responsible for the health of our entire nation, from medical research discoveries applicable to humans, to providing the controls that make available the most wholesome, most abundant and least expensive supply of meat and poultry in the world.

Because of these positions they are often in close proximity to those being regulated. The state of the law in regard to potential personal liability for official acts has placed many of them in jeopardy. Increasingly the threat of personal lawsuits is being used to attempt to influence sound medical and regulatory judgements. While we would like to think that no one would risk the health of the American public and the mission of the agency programs because of the threat of a personal lawsuit, federal employees should not be placed in such a position.

I am enclosing copies of testimony we offered last year to your subcommittee's counterpart in the House. This is in order to show some actual problems with the present situation for regulators in human and animal health-related programs. There are other recent examples. These include a veterinary inspector in charge at a packing house who was told by plant management that whenever he made a medical diagnosis of an animal which caused that animal to be ruled not fit for human consumption that an unspecified tissue sample would be sent by the company to a private laboratory. He was told that if a sample ever came back different than his on-line diagnosis, he was going to get sued.

Several days ago I was called by a higher level official in the Meat and Poultry Inspection Program to inquire whether his coverage under the personal liability insurance policy that our association offers to its members was in effect. He said that he was going to have to make a decision to restrict from sale many thousands of pounds of contaminated meat and had been threatened by the owners of the product with being sued. Individuals applying medical knowledge to protect the public health should not have to fear personal retaliation for their official acts or such attempts to influence their decisions.

The NAFV feels also that the good faith defense issue should not be a roadblock to passage of this legislation. We believe that compromise is possible and that the good faith defense could and probably should be eliminated when actual damages are shown to exist. We urge support of this legislation which would remove the threat of personal lawsuits for official acts. We urge also that the effects of this legislation be applicable to all suits presently pending, including those now on appeal.

Thank you for having our views considered.

Sincerely yours,

William G. Hughes

William G. Hughes
General Counsel

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May 17, 1982

Mr. William Shattuck
Judiciary Committee
U.S. House of Representatives
Rm. B-351A
Rayburn House Office Building
Washington, DC 20515

Dear Mr. Shattuck:

This letter is to urge support of H.R. 24 which would make the United States exclusively liable for acts taken by federal employees within the scope of their employment. As an association of federally employed veterinarians engaged in public practice our members often encounter the hazards of the present legal situation.

Until recent months the actual number of lawsuits filed against federal veterinarians was very low. Lately, however, this number has increased. Worse yet is the intimidation caused by implied and actual threats of personal suits.

Federal veterinarians, and many other federal regulatory and enforcement employees, are particularly vunerable. Federal veterinarians, generally at the GS 11 to GM13 level, are directly responsible for protecting the public health and the health of the animal herds and poultry flocks of the U.S. They are responsible also for enforcing federal animal welfare laws. Many federal veterinarians are stationed in slaughter houses to enforce the Meat and Poultry Inspection Act. Others visit animal herds and poultry flocks as well as breeding, showing and research facilities. This places them in close proximity to often hostile forces. Their professional expertise should not be subjected to even the hint of compromise by being threatened with personal retribution on account of regulatory and diagnostic decisions.

Just recently a GS 12 federal veterinarian was held personally liable for $272,000 for an action which he took only

after clearing it with three higher levels of veterinary supervision up to the Washington level. In other incidents staffing and decisions on the extent of disease or contamination involvement are subjected to attempted influence by those wielding the threat of a personal lawsuit.

Members of this association and federal employees in general urge you to support H.R. 24 and to consider amendments in it to make it conform with S. 1775. Thank you for your concern.

Respectfully submitted,

William G. Hughes

William G. Hughes
General Counsel

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June 7, 1982

Mr. William P. Shattuck
Counsel
Congress of the United States
Committee on the Judiciary
House of Representatives
Washington, DC 20515

Dear Mr. Shattuck:

This is to follow up on your letter of inquiry of May 19, 1982, our telephone conversation of May 25, 1982 and my written testimony dated May 17, 1982 concerning H.R. 24.

As you know NAFV is an organization which represents federally employed veterinarians. While our membership consists of fewer than 1400 active members, actual lawsuits constitute a real problem for these veterinarians, most of whom are involved in disease control and food safety. There are five recent examples of lawsuits naming federal veterinarians personally which I would like to discuss briefly.

In one case a GS 12 veterinarian engaged in disease control work for the Animal and Plant Health Inspection Service of USDA (APHIS) was held personally liable for $272,000.00 for an act which he took only after specific instructions from each of three levels of his supervisors. The act was a refusal to reissue permits to three local veterinary practicioners to conduct brucellosis tests on behalf of the government because of an alleged history of improper testing. The act complained of was well within the scope of his employment. The case is in the U.S. District Court of Montana, Great Falls Division, number CV 79-14-GF.

The second example concerns federal veterinarians engaged

in regulation of the meat and poultry program in the Food Safety and Inspection Service of USDA (FSIS). The suit involves seven veterinary supervisors for their involvement in assigning a particular food inspector to an establishment which did not want him assigned there. This case is in the U.S. District Court in Milwaukee, Wisconsin, number CA 82-C-0172.

The third example involves a several million dollar suit with multiple defendants including the Secretary of Agriculture, several Ohio State Department of Agriculture employees and six APHIS veterinarians. The case involved the depopulation of 20 birds in an exotic bird breeding facility in Ohio. The birds were determined to be infected or exposed to Velogenic Viscerotrophic Newcastle Disease, a virulent bird virus which is highly feared because it could literally destroy the poultry industry in the U.S. The owner signed the agreement to depopulate at an agreed upon indemnity. He now claims he was coerced into signing, that the birds were worth more than the indemnity provided and that the birds were not diseased. The case is numbered C-78-233 and was filed in U.S. District Court, Northern District of Ohio, Eastern Division.

The fourth example is a suit for 26 million dollars against seven defendants including one APHIS veterinarian. The suit concerns alleged damage to cattle as a result of dipping them in Toxaphene to eliminate scabies, a skin parasite. Also involved is the chemical company and the state of California. The case is numbered C-79-673-PCW in the U.S. District Court, Eastern District of California.

The final example was a suit filed against another APHIS veterinarian. He had diagnosed brucellosis in cattle on a farm in Missouri. The animals were required to be killed. Sale to a packing house is permissible provided the slaughter and processing are performed under certain requirements. The farmer asked the veterinarian what he thought she would receive for the cattle. She sued for the difference when she received less from the slaughter house. The case was dismissed recently. It was numbered 79-05085 CV-SW filed in the U.S. District Court, Western District of Missouri, Western Division.

There are other threats current. These usually involve an attempt to influence on the spot medical or regulatory decisions. One recent threat involved an FSIS veterinary inspector in charge in a poultry plant who required chickens which were falling off a processing line onto the floor to be condemned because of contamination. The company apparently felt it should be able to wash the carcasses off and continue using the procedures which were causing this problem. The veterinarian was threatened with a personal lawsuit if he didn't ease up on regulatory enforcement. Other threats have occurred over such things as the speed at which a plant may operate and disposition of carcasses with disease involvement, especially when close medical or regulatory judgements are involved.

If I can offer additional details, please let me know.

Sincerely yours,

William G. Hughes

William G. Hughes

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